No. 95-83-CFX
Status: GRANTED

Title: Alan Meghrig and Margaret Meghrig, Petitioners
v.
KFC Western, Inc.

Docketed:
July 13, 1995

Court: United States Court of Appeals for
the Ninth Circuit

Counsel for petitioner: Zaimes,John P.

Counsel for respondent: Romano,Daniel

Ptn due & mld 7-13-95, see ml label re dkt dt.

Entry	Date	Note	Proceedings and Orders
1	Jun 30 1995	D	Application (A95-15) to extend the time to file a petition for a writ of certiorari from July 13, 1995 to September 11, 1995, submitted to Justice O'Connor.
2	Jul 6 1995		Application (A95-15) denied by Justice O'Connor.
3	Jul 13 1995	G	Petition for writ of certiorari filed.
6	Aug 14 1995	X	Brief amicus curiae of Western States Petroleum Association filed.
7	Aug 14 1995	X	Brief amici curiae of Kaufman and Broad Home Corporation, et al. filed.
4	Aug 16 1995		DISTRIBUTED. September 26, 1995 (Page 95)
5	Aug 16 1995	X	Brief of respondent KFC Western, Inc. in opposition filed.
8	Sep 21 1995	X	Reply brief of petitioners filed.
9	Sep 27 1995		Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 9, 1995. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 8, 1995. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 28, 1995. Rule 29.2 does not apply.
			**********
10	Nov 1 1995		SET FOR ARGUMENT WEDNESDAY, JANUARY 10, 1996. (1ST CASE)
11	Nov 8 1995		Brief amicus curiae of United States filed.
12	Nov 9 1995		Brief of petitioners Alan Meghrig and Margaret Meghrig filed.
13	Nov 9 1995		Brief amicus curiae of Western States Petroleum Association filed.
14	Nov 9 1995		Brief amicus curiae of Petroleum Marketers Association of America filed.
15	Nov 9 1995		Joint appendix filed.
16	Nov 9 1995		CIRCULATED.
18	Nov 9 1995	X	Brief amicus curiae of Southern California Service Station Association filed.
17	Nov 13 1995		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Ninth Circuit.
19	Nov 15 1995		Record filed.
		*	Original record proceedings United States District Court for the Central District of California.

No. 95-83-CFX

Entry	Date	Note	Proceedings and Orders
20	Nov 22 1995	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
21	Dec 4 1995		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
22	Dec 8 1995	X	Brief of respondent KFC Western, Inc. filed.
23	Dec 8 1995		Brief amicus curiae of State of Louisiana filed.
24	Dec 8 1995	X	Brief amicus curiae of Kaufman and Broad Home Corporation filed.
25	Dec 18 1995	G	Motion of Bi-State Development Agency of Missouri-Illinois Devel.Dist. for leave to file a brief as amicus curiae filed.
27	Dec 19 1995	G	Motion of Massachusetts, et al. for leave to file a brief as amici curiae filed.
26	Dec 28 1995	X	Reply brief of petitioners Alan Meghrig, et ux. filed.
28	Dec 29 1995		Opposition of petitioners to motion of Massachusetts, et al. filed.
29	Jan 8 1996		Motion of Bi-State Development Agency of Missouri-Illinois Devel.Dist. for leave to file a brief as amicus curiae GRANTED.
30	Jan 8 1996		Motion of Massachusetts, et al. for leave to file a brief as amici curiae GRANTED.
31	Jan 10 1996		ARGUED.

Supreme Court, U.S.
FILED
JUL 13 1995

95-83

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

ALAN MEGHRIG and MARGARET MEGHRIG,
Petitioners,

VS.

KFC WESTERN, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN P. ZAIMES
Counsel of Record
CLIFTON J. MCFARLAND
MCCLINTOCK, WESTON, BENSHOOF, ROCHEFORT, RUBALCAVA & MACCUISH
444 South Flower Street, 43rd Floor
Los Angeles, California 90071
(213) 623-2322
Counsel for Petitioners

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

QUESTIONS PRESENTED

The citizen suit provision of the Resource Conservation and Recovery Act ("RCRA") gives federal district courts limited jurisdiction to "restrain" any person who has contributed to the handling of a solid or hazardous waste which endangers the environment or to "order such person to take such other action as may be necessary." In a case of first impression, a divided panel of the Ninth Circuit Court of Appeals has held that this provision also authorizes a private party to pursue a damages claim for reimbursement of the costs of cleaning up a contaminated site.

The same RCRA citizen suit provision allows a citizen suit only where a solid or hazardous waste "may present an *imminent* and substantial endangerment to health or the environment." The Ninth Circuit has also held that a RCRA citizen suit may be commenced well after the site has been fully cleaned up, notwithstanding the "imminent and substantial endangerment" language of the statute.

The questions presented for review are:

1. Whether the citizen suit provision of RCRA, 42 U.S.C. § 6972 (a)(1)(B), which authorizes district courts to "restrain" persons who have contributed to contamination or to "order such persons to take such other action as may be necessary", also authorizes a private party suit for reimbursement of cleanup costs.

2. Whether the citizen suit provision of RCRA, 42 U.S.C. § 6972(a)(1)(B), which only permits suits against persons who have contributed to the disposal of solid or hazardous waste "which may present an imminent and substantial endangerment to health or the environment", can be read to authorize a suit for contamination that was fully remediated years before commencement of the suit.

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISION INVOLVED 2

STATEMENT OF THE CASE 3

A. Statement Of Relevant Facts 4

B. Proceedings In The District Court Below 5

C. Proceedings In The Ninth Circuit Court Of Appeals 6

REASONS FOR GRANTING THE PETITION 9

I. The Ninth Circuit's Determination That 42 U.S.C. § 6972(a)(1)(B) Contains An Implied Right Of Action For Damages Conflicts With The *Sea Clammers* And *Gwaltney* Decisions Of This Court And Likely With A Pending Decision Of The Eighth Circuit 10

A. The Ninth Circuit's Decision Directly Conflicts With This Court's Decision In *Sea Clammers* By Expanding Citizen Plaintiff Remedies Beyond Those Expressly Provided In The Statute And By Doing So Contrary To Congressional Intent 10

TABLE OF CONTENTS

Page(s)

1. The Plain Language Of The Statute Authorizes Only Injunctive Relief 10

2. The History And Purpose Of Federal Environmental Citizen Suit Provisions And The Legislative History Of RCRA Confirm That Citizen Suits Are Limited To Injunctive Relief Only 13

a. The History And Purpose Of Citizen Suits 13

b. The Legislative History of RCRA 15

B. The Ninth Circuit's Decision Conflicts With This Court's Decision In *Gwaltney* By Providing A Remedy For Harms Wholly Past 19

C. The Ninth Circuit's Interpretation Of 42 U.S.C. § 6972(a)(1)(B) Will Likely Also Conflict With The Impending Eighth Circuit Decision In *Furrer v. Brown* 21

II. The Questions Presented Here Are Important Ones 22

III. The Ninth Circuit Erred In Interpreting The Statute To Allow Private Parties To Sue For Monetary Relief 25

TABLE OF CONTENTS

Page(s)

A. Under General Principles Of Statutory Interpretation, Neither The Plain Language Nor The Legislative History Of The RCRA Citizen Suit Provision Authorizes A Suit For Monetary Damages Or "Restitution" ... 25

B. The Ninth Circuit Improperly Implied A Damages Right Of Action For Citizen Plaintiffs ... 26

C. The Relief That The Majority Opinion Would Provide Runs Counter To The Very Purpose of Citizen Suit Provisions ... 28

D. The Ninth Circuit Erred In Interpreting The Statute To Authorize Relief For Harms Wholly Past ... 28

CONCLUSION ... 30

APPENDIX A ... A1

APPENDIX B ... A21

APPENDIX C ... A24

APPENDIX D ... A26

APPENDIX E ... A27

TABLE OF AUTHORITIES

CASES

Bayless Invest. & Trad. Co. v. Chevron U.S.A., Inc., 39 Env't Rep. Cas. 1428 (D. Ariz. 1994) ... 15

California v. Sierra Club, 451 U.S. 287 (1981) ... 26, 27

City of Chicago v. Environmental Defense Fund, ___ U.S. ___, 114 S.Ct. 1588 (1994) ... 27

Commerce Holding Co., Inc. v. Buckstone, 749 F.Supp. 441 (E.D.N.Y. 1990) ... 15

Cort v. Ash, 422 U.S. 66 (1975) ... 26, 27

Furrer v. Brown, No. 94-3281 EMSL (8th Cir. *argued* Apr. 12, 1995) ... 21

Gache v. Town of Harrison, 813 F.Supp. 1037 (S.D.N.Y. 1993) ... 15

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987) ... passim

Hallstrom v. Tillamook County, 493 U.S. 20 (1989) ... 12, 13

KFC Western, Inc. v. Meghrig, 23 Cal.App.4th 1167, 28 Cal.Rptr.2d 676 (1994) ... 5, 22

KFC Western, Inc. v. Meghrig, 49 F.3d 518 (9th Cir. 1995) ... 1

Kaufman and Broad - South Bay v. Unisys Corp., 822 F.Supp. 1468 (N.D. Cal. 1993) ... 15

M.E.S.S. v. Weinberger,
707 F.Supp. 1182 (E.D. Cal. 1988) 15

Middlesex County Sewerage Authority v. National Sea Clammers Assn., 453 U.S. 1 (1981) ..... passim

Mola Dev. Corp. v. United States,
22 Env't. Rep. Cas. 1443 (C.D. Cal. 1985) 15

Portsmouth Redev. & Housing Auth. v. BMI Apt. Assoc.,
847 F.Supp. 380 (E.D. Va. 1994) 15

Touche Ross & Co. v. Redington,
442 U.S. 560 (1979) 26

Transamerica Mortgage Advisors, Inc. v. Lewis,
444 U.S. 11 (1979) 26

United States v. Aceto Agric. Chem. Corp.,
872 F.2d 1373 (8th Cir. 1989) 7, 21

Wilshire Westwood Assocs. v. Atlantic Richfield Corp.,
881 F.2d 801 (9th Cir. 1989) 23

STATUTES

15 U.S.C. § 2619, Toxic Substances Control Act 13

16 U.S.C. § 1540(g), Endangered Species Act 13

28 U.S.C. § 1254 2

28 U.S.C. § 1331 3

28 U.S.C. § 1367 ..... 13, 18

30 U.S.C. § 1270, Surface Mining Control and Reclamation Act 14, 18

33 U.S.C. § 1365, Federal Water Pollution Control Act 14

33 U.S.C. §1415(g), Marine Protection, Research and Sanctuaries Act 13

42 U.S.C. § 300j-8 Safe Drinking Water Act 14

42 U.S.C. § 4911, Noise Control Act 14

42 U.S.C. § 6921. 16

42 U.S.C. § 6928 16

42 U.S.C. § 6972 ..... passim

42 U.S.C. § 6973 16

42 U.S.C. § 7604, Clean Air Act 14

42 U.S.C. §§ 9601-96, CERCLA 8, 14, 22, 24

42 U.S.C § 9613(g) 24

43 U.S.C. § 1349, Outer Continental Shelf Lands Act 14

40 C.F.R. §§ 300.400 - 300.440 24

Fed. R. Civ. Pro. 12(b)(6) 3

MISCELLANEOUS

4 W. Rodgers, *Environmental Law* § 7.6(b) 15

7 James W. Moore, *Moore's Federal Practice*, ¶ 65.04[1], 65-84 (2d ed. 1994) 11, 12

116 Cong.Rec. 33104 (1970) 15

Boyer & Meidinger, *Privatizing Regulatory Enforcement*, 34 Buff. L. Rev. 833, 847-851 (1985) 14

Fadil, *Citizen Suits Against Polluters*, 9 Harv. Envt'l L. Rev. 23, 26-28 (1985) 14

D. Dobbs, *Remedies* §§ 4.2-4.3 (1973) 27

Hecker, *The Citizen's Role in Environmental Enforcement*, Nat. Res. & Env. (Spring 1994), 31 28

H.R. Rep. No. 198, 98th Cong., 2d Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612 ..... 18, 25

H.R. Rep. No. 253, pt. 3, 99th Cong., 1st Sess. (1985) ... 17

Inside EPA Weekly Report, *Court Ruling On Cost Recovery in RCRA Spawns Raft of New Lawsuits*, May 12, 1995 at 1-2 . 22

G. Palmer, *The Law of Restitution* §§ 1.1-1.8 (1978) ... 27, 28

S. Cooke, *The Law of Hazardous Waste* § 16.03(3)(f) (1995) 15

S. Rep. No. 284, 98th Cong., 1st Sess. 57 (1983) 18

No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1995

Alan Meghrig and Margaret Meghrig,
Petitioners,
vs.
KFC Western, Inc.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners Alan Meghrig and Margaret Meghrig (the "Meghrigs") respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 49 F.3d 518, and is reprinted in the Appendix hereto at pages A1 to A20. The unpublished order of the Court of Appeals dated April 14, 1995 denying the Meghrigs' petition for rehearing is reprinted in the Appendix at page A26.

The unpublished order and opinion of the District Court dated November 9, 1992 dismissing the action is reprinted in the Appendix at pages A21 to A23. The unpublished order of the District Court dated September 21, 1992, granting the Meghrigs' motion pursuant to Federal Rule of Civil Procedure 12(b)(6) and granting KFC Western leave to amend is reprinted in the Appendix at pages A24 to A25.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on March 1, 1995. A timely petition for rehearing was denied on April 14, 1995. This petition is filed within ninety days of denial of the petition for rehearing by the Court of Appeals. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 42, United States Code, § 6972(a)(1)(B), provides, in pertinent part, that:

> "Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf--
> (1)(A) ***
> (B) *against any person*, including the United States, and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, *who has contributed* or who is contributing *to the past or present* handling, storage, treatment, transportation, or *disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment*;
> * * *

> *The district court shall have jurisdiction*, without regard to the amount in controversy or the citizenship of the parties . . . *to restrain any person* who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste *referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both*, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.[1]
>
> (Emphasis added.)

STATEMENT OF THE CASE

The District Court's jurisdiction in this action is based on 42 U.S.C. § 6972(a), and 28 U.S.C. §§ 1331 and 1367.

This case arises out of the cleanup of gasoline-contaminated soil at a commercial property located in Los Angeles, California upon which a gasoline service station was once operated. The District Court dismissed the case for lack of subject matter jurisdiction based on Petitioners' second motion therefor pursuant to Federal Rule of Civil Procedure Rule 12(b)(6). This Petition follows the Ninth Circuit Court of Appeals' reversal of the District Court's decision.

Because the issues herein were raised at the pleading stage, the facts set forth below, though disputed in many instances by Petitioners and incomplete in other instances, are primarily those alleged by Respondent in its first amended complaint. Additionally, certain undisputed facts developed in discovery in the parallel state court action are added sparingly to complete the factual picture for

---

[1] Section 6972 of Title 42, United States Code, is reprinted in its entirety in the Appendix at pages A27 to A32.

this Court.

A. Statement Of Relevant Facts

The real property which is the subject of the underlying action is presently owned by Respondent (plaintiff below) KFC Western, Inc. ("KFC"), which operates a Kentucky Fried Chicken franchise on that property. (C.R. 10, ¶ 2.)[2] KFC bought the property from Petitioners (defendants below) Alan Meghrig and Margaret Meghrig ("the Meghrigs") nearly twenty years ago, in or about September 1975. (C.R. 10, ¶¶ 2, 15.)

The Meghrigs, who are brother and sister, had owned the property for 12 years. Title had been put in their names by their father when he acquired the property in 1963, while both Petitioners were teenagers. The Meghrigs never operated a service station on the property. Prior owners and/or their lessees had operated gasoline service stations on the property for 45 years (dating back to 1917) before the Meghrigs bought it. Plaintiff has not sued any of those prior owners or lessees.

The last underground storage tanks on the property, which had previously been abandoned, were removed within two years of the time the Meghrigs took title. Notwithstanding the long history of service station operations on the property, KFC has sued the Meghrigs, and only the Meghrigs, for reimbursement of the costs of cleaning up gasoline contamination on the property caused by an underground storage tank leak. (C.R. 10, ¶¶ 1, 4.)

KFC discovered this contamination in October 1988, commenced remediation, and *completed that remediation* in early 1989. (C.R. 10, ¶ 5.) The Meghrigs were unaware of the

---

[2] Although the record on appeal to the Ninth Circuit is not before this Court, we include references to it in order to demonstrate the record support for the factual assertions herein and to have those citations readily accessible to the Court should the record be made available to it.

contamination until well after the completion of remediation. (C.R. 10, ¶¶ 5, 16.) Any endangerment posed by the contamination was thus eliminated in early 1989, when cleanup was completed and was certified complete by the appropriate governmental agency.

KFC first brought suit in the District Court over three years later, in late May 1992. (C.R. 10, ¶ 16.) Consequently, KFC cannot plead, and has not pled, that any "imminent and substantial endangerment" existed at the time it filed its suit. Rather, KFC can only plead, and did only plead below, that the alleged contamination "*may have presented*" (in the past) an imminent and substantial endangerment. (C.R. 10, ¶ 23.)

B. Proceedings In The District Court Below

KFC's District Court complaint consisted of a single cause of action brought under the citizen suit provisions of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a)(1)(B). The complaint sought only monetary damages for past cleanup expenses which KFC had allegedly incurred. (C.R.10, ¶¶ 7, 24.)

[KFC originally sued these same two defendants in California state court under nine different state statutory and common law theories. *See, KFC Western, Inc. v. Meghrig*, 23 Cal.App.4th 1167, 28 Cal.Rptr.2d 676 (1994). In that action, as here, KFC sought to recover damages in the form of monies it had previously expended to remediate soil contamination on the property.]

In the District Court, petitioners moved to dismiss KFC's original RCRA complaint on two independent grounds: (1) because the complaint admitted that the alleged contamination had been fully remediated more than three years prior to the filing of KFC's complaint, there was no "imminent and substantial endangerment," as required for RCRA citizen suits; and (2) because KFC sought only money damages, it could not maintain a citizen suit under RCRA, since that statute only authorizes injunctive relief. The District Court granted the Meghrigs' motion but gave KFC leave to

amend. App. at A24.

KFC's amended complaint attempted to cure the defects in its original complaint by alleging: (1) that the contamination "may have presented" (at some time in the past) an imminent and substantial endangerment; and (2) that its damages claim was really one for "equitable restitution." Petitioners again moved to dismiss on the grounds that these wording changes did not cure the defects in KFC's RCRA cause of action. The endangerment was still not "imminent," irrespective of what it "may have been" at some past time. And KFC's "equitable restitution" claim, regardless of its new label, sought no more than did KFC's original complaint: money damages.

The District Court relied on two independent grounds in granting the Meghrigs' renewed motion to dismiss, this time without leave to amend. First, the Court determined that the citizen suit provision of RCRA under which KFC had brought this action was forward-looking and was designed to provide a method for private citizens to function as private attorneys general to bring suit to curtail *current* risks posed by contamination. App. at A22 to A23. Because the citizen suit provision, 42 U.S.C. § 6972(a)(1)(B), authorizes such suits only where there is an "*imminent* and substantial endangerment to health or the environment," and because the cleanup at issue here was completed several years before KFC commenced its suit, the District Court determined that there was no endangerment to be addressed and that KFC's suit was therefore not authorized by RCRA. App. at A22. Second, the District Court ruled that the provision of RCRA that authorizes district courts to "restrain" and "order such person to take such other action as may be necessary" entitles plaintiffs like KFC only to injunctive relief (prohibitory or mandatory). Because KFC was seeking damages in the form of costs incurred for a completed cleanup, the relief which KFC sought could not be granted under section 6972(a)(1)(B). App. at A22 to A23.

C. Proceedings In The Ninth Circuit Court Of Appeals

In December 1992, KFC appealed the judgment of the

District Court to the Court of Appeals for the Ninth Circuit. On March 1, 1995, a divided Court of Appeals, in an opinion by Circuit Judge Pregerson, reversed the judgment of the District Court. App. at A1 to A12. Circuit Judge Brunetti issued a lengthy and pointed dissenting opinion. App. at A12 to A20.

The majority opinion first addressed the issue whether the danger must exist at the time of filing suit in order to meet the "imminent and substantial endangerment" requirement of a RCRA citizen suit. The majority acknowledged that KFC had cleaned up the gasoline contamination more than three years prior to filing suit and further observed that the legislative history of RCRA disclosed that the term "imminent" in the RCRA citizen suit provisions means that a claim lies only:

> "for events which took place at some time in the past, but *which continue to present a threat* to the public health or the environment." App. at A4 (emphasis in original).

Nevertheless, the majority opinion concluded that RCRA authorizes citizen suits with respect to contamination that *in the past* posed imminent and substantial danger. App. at A5. The majority relied on *dicta* from an Eighth Circuit case brought by EPA, not a private party, under a separate provision of RCRA. *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373 (8th Cir. 1989). The majority also relied on its own reading of RCRA as having the broad purpose of providing authority to the courts to grant all relief necessary to ensure protection of human health and the environment. App. at A6.

The Ninth Circuit majority also concluded that a citizen suit for compensatory damages could be implied under RCRA based on the following statutory language:

> "[t]he district court shall have jurisdiction ... to restrain any person who has contributed or who is contributing to [an imminent and substantial

endangerment and] to *order such person to take such other action as may be necessary...*"
App. at A6 *quoting* 42 U.S.C. § 6972(a)(1)(B)
(emphasis supplied by majority opinion).

Finally, the majority opined that it would be poor public policy to interpret the RCRA citizen suit provision to forbid the recovery of cleanup costs because the Comprehensive Environmental Response, Compensation and Recovery Act ("CERCLA")[3] and state law do not provide adequate substitute sources of relief. In a footnote, the Court explained that CERCLA specifically excludes suits based on petroleum contamination and cryptically observed as to state law claims that:

> "Even though causes of action for nuisance, trespass and potential negligence are available to plaintiffs such as KFC, tort remedies are generally inadequate because of the difficulties of proof and attendant court delays." App. at A11 n.6.

[Ironically, KFC's ongoing state court action based on nuisance and trespass was set to commence trial on August 1, 1995.]

A vigorous dissent urged four separate bases for affirming the District Court's opinion:

1. Both the plain language of the phrase "such other action as may be necessary" and the specific legislative history of the RCRA citizen suit provision demonstrate that Congress did not intend environmental citizen suits to include actions for monetary reimbursement. App. at A13 to A14.

2. The unambiguous term "may present an imminent and substantial endangerment" means that the endangerment must exist at the site at the time the private citizen files suit. The statute would read "may or *may have* presented" if it intended to also cover

---

[3] 42 U.S.C. §§ 9601-96.

past endangerments. App. at A14.

3. The notice requirements of § 6972 of RCRA further support the requirement that the "imminent and substantial endangerment" be present at the time of filing suit. The statute requires that a private citizen give 90 days notice to the EPA Administrator and further provides that, if the EPA Administrator elects to bring suit, a private citizen is foreclosed from bringing suit. The dissent urged that this provision confirmed that the "imminent and substantial endangerment" must exist at the time the suit is filed and that the citizen suit provisions do not permit post-cleanup reimbursement actions. App. at A14.

4. The absence of an express limitations period in RCRA, particularly in light of the fact that there is such an express limitations period in CERCLA, further confirms that RCRA does not authorize citizen suits for damages. App. at A15 to A16.

REASONS FOR GRANTING THE PETITION

By implying for the first time a right of action for the recovery of cleanup costs in RCRA's citizen suit provision, the Court of Appeals has dramatically increased the scope of remedies authorized by Section 6972 beyond the prohibitory and mandatory injunctive relief expressly provided therein. In so doing, the Court of Appeals has decided an important federal question with a heavy impact on the extremely active area of environmental litigation in a way that conflicts with two prior opinions of this Court on the scope of citizen suit provisions in federal environmental statutes.

In addition, there is currently pending in the Court of Appeals for the Eighth Circuit an appeal which presents the same issues and as to which it appears the Eighth Circuit will reach a conflicting decision. For these reasons, it is necessary for this Court to determine the proper scope of the citizen suit provisions of RCRA.

I. The Ninth Circuit's Determination That 42 U.S.C. § 6972(a)(1)(B) Contains An Implied Right Of Action For Damages Conflicts With The *Sea Clammers* And *Gwaltney* Decisions Of This Court And Likely With A Pending Decision Of The Eighth Circuit

The scope and extent of environmental citizen suit provisions in general, and the scope and extent of the citizen suit provision in RCRA in particular, are matters of exceptional importance. This Court has issued two significant decisions interpreting the scope of environmental citizen suit provisions. *Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1 (1981) ("*Sea Clammers*"); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987) ("*Gwaltney*"). This Court expressly ruled in *Sea Clammers* that federal courts should not expand the remedies provided to citizen plaintiffs beyond those expressly provided in the statute, absent strong indicia of Congressional intent to so expand. This Court has also held in *Gwaltney* that the structure of citizen suit provisions in federal *environmental statutes* demonstrates that these provisions permit ongoing harms to be enjoined, but do not provide a remedy for harms wholly past.

The Court of Appeals majority runs afoul of both proscriptions by expanding the RCRA citizen suit provision to allow an implied right of action for the reimbursement of cleanup costs for contamination that has long since been cleaned up.

A. The Ninth Circuit's Decision Directly Conflicts With This Court's Decision In *Sea Clammers* By Expanding Citizen Plaintiff Remedies Beyond Those Expressly Provided In The Statute And By Doing So Contrary To Congressional Intent

1. The Plain Language Of The Statute Authorizes Only Injunctive Relief

This Court's decision in *Sea Clammers* forbids lower courts

to expand citizen suit remedies beyond those expressly provided in the statute. The Ninth Circuit majority has construed RCRA in a manner that its express language cannot support. The RCRA citizen suit provision expressly provides only the following two remedies where the handling of a hazardous or solid waste has created an imminent and substantial endangerment:

> "The district court shall have jurisdiction...to [1] *restrain any person* who has contributed or who is contributing to the past or present handling...of any solid or hazardous waste [which may present an imminent and substantial endangerment to human health or the environment, or] [2] *to order such person to take such other action as may be necessary, or both....*
>
> 42 U.S.C. § 6972(a)(1)(B) (emphasis added).

The sole purpose of Section 6972(a)(1)(B) is to allow injunctive relief where the handling of solid or hazardous waste poses an imminent and substantial endangerment. The district court's jurisdiction "to restrain" undisputedly confers the power to issue an injunction prohibiting a person from acting in a manner which may be creating an imminent and substantial endangerment. The term "order such person to take such other action may be necessary" allows courts to issue mandatory injunctions as well; to order contamination cleanup, for example.

The Court of Appeals erroneously relied on the language allowing district courts to take such "other action as may be necessary" as the basis for a compensatory damages action. This language does not allow for compensatory actions. The reference to "such other action" in this phrase denotes action different from or in addition to the action required of "such person" pursuant to a restraining order.[4] The "as may be necessary" language signifies

---

[4] Congress's decision to grant district courts separate and explicit jurisdiction to issue both prohibitory and mandatory injunctions, rather than simply

(continued...)

measures required to stabilize and/or eliminate the imminent and substantial endangerment.

Mandatory injunctive relief is important in the RCRA context because, unlike those statutes where citizen-plaintiffs sue only to make a defendant *stop* doing something (e.g. violating an air or water permit limit), in the RCRA context citizen-plaintiffs may need to make defendants both *stop* causing a solid waste problem and *start* doing something, i.e., cleaning it up. Thus arose the need for language to provide for mandatory injunctive relief.

The RCRA citizen suit provision, then, is not ambiguous and neither expressly nor implicitly grants a district court jurisdiction to award a plaintiff costs it has incurred in cleaning up a solid waste problem. This Court has repeatedly instructed the federal courts that unambiguous statutory language should be accorded its plain meaning. *See Hallstrom v. Tillamook County*, 493 U.S. 20, 28 (1989) (construing the RCRA citizen suit provision and stating that plain statutory language is conclusive absent a "clearly expressed legislative intention to the contrary.") The provision at issue here plainly provides for prohibitory and mandatory injunctive relief and just as plainly does not provide for recovery of past cleanup costs.

This Court has further instructed the federal courts that "to acknowledge ambiguity is not to conclude that all interpretations are equally plausible." *Gwaltney*, 484 U.S. at 57. Thus, even to the extent that the language in question may be ambiguous, its "most natural reading" (*id.*) is as a grant of jurisdiction to provide mandatory injunctive relief and not monetary relief. In the case of

---

[4](...continued)
providing for a more general injunctive power, should be viewed under the presumption that Congress was aware of the traditional reluctance of federal courts to issue preliminary mandatory injunctions. *See* 7 James W. Moore, *Moore's Federal Practice*, ¶65.04[1], 65-84 (2d ed. 1994). By specifically granting district courts jurisdiction to issue mandatory injunctions, Congress may have intended to dispel the longstanding concerns of federal courts regarding the issuance of mandatory injunctions before a hearing on the merits.

ambiguous language, recourse may be had to the legislative history.[5]

2. The History And Purpose Of Federal Environmental Citizen Suit Provisions And The Legislative History Of RCRA Confirm That Citizen Suits Are Limited To Injunctive Relief Only

This Court's decision in *Sea Clammers* only permits deviation from the express terms of a citizen suit provision where there are strong indicia of Congressional intent to provide a further remedy. In the case of RCRA, there not only are no indicia of such Congressional intent, the relevant legislative history confirms that the citizen suit provisions of RCRA are limited to injunctive relief. In fact, the legislative history of RCRA, particularly in light of the history and purpose of environmental citizen suit provisions, demonstrates that Congress has considered including a remedy for monetary relief and deliberately decided not to do so.

a. The History And Purpose Of Citizen Suits

Congress introduced citizen suits into environmental statutory law in the 1970 amendments to the Clean Air Act. Since then, with the Clean Air Act serving as a model, Congress has included such provisions in virtually every piece of federal environmental legislation.[6] *Hallstrom*, 493 U.S. at 23.

---

[5] The Court of Appeals did not indicate whether it viewed the language at issue as ambiguous or unambiguous. Apparently, that court concluded that language allowing district courts to order parties to take "such other action as may be necessary" unambiguously provides for monetary relief. However, the Court provided no analysis other than to state that it "agree[d] with KFC that RCRA authorizes a restitutionary remedy...." App. at A6. Neither did the Court of Appeals examine the legislative history on this issue.

[6] *See, e.g.* Toxic Substances Control Act, 15 U.S.C. § 2619; Endangered Species Act, 16 U.S.C. § 1540(g); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270; Marine Protection, Research and Sanctuaries Act, 33 U.S.C. §

Consequently, the citizen suit provisions in the various federal environmental statutes resemble one another in many respects. Fadil, *Citizen Suits Against Polluters*, 9 Harv. Envt'l L. Rev. 23, 26-28 (1985); *see also*, Boyer & Meidinger, *Privatizing Regulatory Enforcement*, 34 Buff. L. Rev. 833, 847-851 (1985). All contain a notice provision. All contain a bar to suit if the government is pursuing the matter. Virtually all provide for federal district court jurisdiction regardless of the amount in controversy or the citizenship of the parties. *Id.* All authorize awards of attorneys' and expert witness fees and limited equitable relief (a violator may be required to comply with the applicable standards). Accordingly, the rationale adopted by this Court in *Sea Clammers* and *Gwaltney* is equally applicable to the RCRA citizen suit provision.

The purpose of citizen suit provisions in federal environmental statutes is to allow citizen-plaintiffs to act as "private attorneys general." There was concern in Congress as the initial citizen suit provisions were being enacted into law that a citizen suit provision that provided too broad a remedy could strip the government of prosecutorial discretion, lead to over-enforcement of the environmental laws and overburden the court system. The balance struck by Congress included the decision not to include a private damages remedy in citizen suit provisions. This position was articulated in the debates over the first citizen suit provision (in the 1970 Clean Air Act) as follows:

> "It has been argued, however, that conferring additional rights on the citizen may burden the courts unduly. I would argue that the citizen suit provision of [this bill] has been carefully drafted to prevent this consequence from arising. First of all, it should be noted that the bill makes no provision

---

1415(g); Federal Water Pollution Control Act, 33 U.S.C. § 1365; Safe Drinking Water Act, 42 U.S.C. § 300j-8; Noise Control Act, 42 U.S.C. § 4911; Clean Air Act, 42 U.S.C. § 7604; CERCLA, 42 U.S.C. § 9659; Outer Continental Shelf Lands Act, 43 U.S.C. § 1349.

> for damages to the individual. It therefore provides no incentives to suit other than to protect the health and welfare of those suing and others similarly situated. It will be the rare, rather than the ordinary, person, I suspect, who with no hope of financial gain and the very real prospect of financial loss, will initiate court action under this bill."
>
> 116 Cong. Rec. 33104 (1970) (comments of Sen. Hart) *quoted in Sea Clammers*, 453 U.S. at 17 n.27.

In light of the purpose of citizen suits, the overwhelming weight of case authority supports the proposition that monetary relief, whether labelled economic, compensatory or restitutionary, is not available as part of a RCRA citizen suit cause of action. *Kaufman and Broad - South Bay v. Unisys Corp.*, 822 F.Supp. 1468 (N.D. Cal. 1993); *Commerce Holding Co., Inc. v. Buckstone*, 749 F.Supp. 441 (E.D.N.Y. 1990); *Portsmouth Redev. & Housing Auth. v. BMI Apt. Assoc.*, 847 F.Supp. 380 (E.D. Va. 1994); *Gache v. Town of Harrison*, 813 F.Supp. 1037 (S.D.N.Y. 1993); *Mola Dev. Corp. v. United States*, 22 Env't. Rep. Cas. 1443 (C.D. Cal. 1985); *M.E.S.S. v. Weinberger*, 707 F.Supp. 1182 (E.D. Cal. 1988); *but see Bayless Invest. & Trad. Co. v. Chevron U.S.A., Inc.*, 39 Env't Rep. Cas. 1428 (D. Ariz. 1994). In addition, before the Ninth Circuit's ruling, the leading treatises on hazardous waste and environmental law had concluded that, under the RCRA citizen suit provision, "it is well settled that" an award of damages is not permitted. S. Cooke, *The Law of Hazardous Waste* § 16.03(3)(f) (1995); *see also* 4 W. Rodgers, *Environmental Law* § 7.6(b) (1992).

b. The Legislative History of RCRA

In the early 1970s, some federal courts suggested that citizen enforcers might recover damages under citizen suit provisions that did not expressly authorize damage relief. But in 1981, this Court ruled in *Sea Clammers* that no federal private right

of action for damages exists based on violations of the Federal Water Pollution Control Act ("FWPCA") or the Marine Protection, Research and Sanctuaries Act ("MPRSA"). This Court noted that the legislative history of both the FWPCA and the Clean Air Act mandated this conclusion.[7] 453 U.S. at 17-18 n.28. As noted earlier, the citizen suit provisions in all environmental statutes, including RCRA, are modeled on the Clean Air Act and closely resemble one another.

The chief difference in the language of the RCRA citizen suit provision from the provision in the Clean Air and Clean Water Acts is the inclusion of the authority to "order such action as may be necessary," which appears in RCRA but not the earlier Acts. The only other citizen suit provision that contains the "order such other action as may be necessary" language is the CERCLA citizen suit provision. The legislative history of CERCLA makes the purpose of this language very clear. The CERCLA citizen suit was added to that statute by the Superfund Amendments and Reauthorization Act of 1986, two years after the RCRA citizen suit provision at issue here was enacted. In its consideration of the CERCLA citizen suit provision, the House Judiciary Committee both referenced and explained the "such other action" language in RCRA:

---

[7] This Court also noted that the "elaborate enforcement provisions" addressing private and public enforcement under the FWPCA and the MPRSA and reasoned that Congress intended such painstakingly defined remedies to be exclusive. 453 U.S. at 13-15. The remedies afforded by RCRA are equally elaborate. RCRA authorizes the EPA to respond to violations of RCRA with compliance orders, civil suits, and such orders as may be necessary to protect public health and the environment. *See* 42 U.S.C. § 6973; 42 U.S.C. § 6928. The EPA may assess penalties for violations of Subtitle C (42 U.S.C. § 6921 *et seq.*) for noncompliance, and may assess penalties for failure to comply with an EPA Order issued pursuant to 42 U.S.C. § 6973, 42 U.S.C. §6928(a), and 42 U.S.C. § 6973. Criminal penalties are available under 42 U.S.C. § 6928(d). In addition, any citizen may file suit against the EPA where there is an alleged failure of the EPA to perform any non-discretionary act or duty under 42 U.S.C. § 6972(a)(2).

> "the cause of action for abatement of an imminent and substantial endangerment, like the one added to [RCRA] in 1984, is designed solely to aid in the clean-up of hazardous waste sites.
>
> The Committee notes that this type of relief is consistent with that available for other actions authorized by this section. *These suits may also be brought for injunctive relief only*, i.e., citizens may seek a restraining order against private parties and/or a mandamus order to require the EPA or other relevant agency to perform a mandatory duty under CERCLA. *None of these actions are for money damages*. They are actions directly related to the principal purpose of the Superfund law -- i.e., to bring about quick identification and effective clean-up of dangerous hazardous waste sites."
>
> H.R. Rep. No. 253, pt. 3, 99th Cong. 1st Sess. (1985) (emphasis added).[8]

Not surprisingly, the legislative history of the 1984 amendments to RCRA reflects the same Congressional intent: to authorize federal courts to issue injunctive relief to private party plaintiffs but not to award compensatory damages. The legislative history expressly stated that citizens have:

> "a limited right under Section 7002 [42 U.S.C. § 6972] to sue to *abate* an imminent and

---

[8] The language of the CERCLA amendments bill as it left the Judiciary Committee provided the district court with jurisdiction "to immediately restrain any person contributing to the endangerment ... [or] to order such person to take response action as provided for in this Act." The language in the bill as it passed the House was identical. The Conference Committee deleted the "endangerment" language in the citizen suit as redundant of RCRA and modified the statutory language accordingly. H.R. Rep. No. 253, pt. 3, 99th Cong. 1st Sess. (1985) (emphasis added).

substantial endangerment." H.R. Rep. No. 198, 98th Cong., 2d Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612 (emphasis added.)

The RCRA legislative history also explains the primary goal of § 6972(a)(1)(B) as "the *prompt abatement* of imminent and substantial endangerments." *Id.* (Emphasis added.)[9]

Finally, it bears noting that, when Congress *intends* monetary relief to be available, it *expressly* says so. Indeed, the only environmental statute with a citizen suit provision that allows citizens to sue for damages is the Surface Mining Control and Reclamation Act ("SMCRA"). Section 520(f) of SMCRA, captioned "Action for damages", provides:

> "Any person who is injured in his person or property through the violation by any operator of any rule, regulation, order, or permit issued pursuant to this chapter may bring an action for damages."
>
> 30 U.S.C § 1270(f).

In sum, following this Court's directives in *Sea Clammers*, the history of federal statutory citizen suit provisions, read together with RCRA's express legislative history compels the conclusion that only injunctive relief, and not monetary damages, is available under the RCRA citizen suit provision. The Ninth Circuit's holding is directly contrary to this Court's teachings in *Sea Clammers*.

---

[9] Several House members feared that the amended citizen suit provisions would cause citizens to flood the federal courts with pendent state-law claims, including tort claims for damages, while suing "to abate imminent hazards." *Id.* at 5635. While Congress decided not to prohibit pendent state-law claims, it cautioned that it expected "courts to exercise their discretion concerning pendant jurisdiction in a way that will not frustrate or delay the primary goal of this provision, namely the prompt abatement of imminent and substantial endangerments." *Id.* at 53. The corresponding Senate Committee Report echoed the House Committee's comments on pendant jurisdiction. S. Rep. No. 284, 98th Cong., 1st Sess. 57 (1983).

B. The Ninth Circuit's Decision Conflicts With This Court's Decision In *Gwaltney* By Providing A Remedy For Harms Wholly Past

The Ninth Circuit's conclusion that the RCRA citizen suit provision can be used to address violations that have been remedied three years prior to commencement of suit directly conflicts with this Court's opinion in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987). In *Gwaltney*, respondent argued that an action should lie for wholly past violations of the FWPCA despite the statutory language that allowed suit only against parties alleged "to be in violation" of the Act. This Court, noting the statute's use of the present tense, disagreed and concluded that the FWPCA citizen suit provision did not apply to harms wholly past. *Gwaltney*, 484 U.S. at 57-59. Here, the Ninth Circuit concluded that an action should lie for wholly past endangerment despite the statutory language that allows suit only for conditions "*which may present* an imminent and substantial endangerment." 42 U.S.C. § 6972(a)(1)(B) (emphasis added).

In holding that the citizen suit provision of the FWPCA reached only ongoing and not wholly past violations, this Court also focused on the notice provision in that Act which is virtually identical to the RCRA notice provision:

> "Any other conclusion would render incomprehensible [the Act's] notice provision, which requires citizens to give 60 days' notice of their intent to sue to the alleged violators as well as to the Administrator and the State. If the Administrator or the State commences enforcement action within that 60-day period, the citizen suit is barred, presumably because governmental action has rendered it unnecessary. It follows logically that the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus

likewise render unnecessary a citizen suit. *If we assume, as respondents urge, that citizen suits may target wholly past violations, the requirement of notice to the alleged violators becomes gratuitous.*
Id., 484 U.S. at 59-60 (Emphasis added.)

Finally, the FWPCA provision examined in *Gwaltney*, bars citizen suits in circumstances where the government is addressing the harm at issue. RCRA bars citizen suits under those same circumstances. This Court in *Gwaltney* further addressed the import of the citizen suit bar in rejecting the argument that wholly past harms could be reached by the FWPCA citizen suit provision:

"Adopting respondents' interpretation [that the citizen suit provision reaches harms wholly past] . . . would create a second and even more disturbing anomaly. The bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than to supplant governmental action. . . *Permitting citizen suits for wholly past violations of the Act could undermine the supplementary role envisioned for the citizen suit.*"
Id. at 60 (emphasis added).

This Court determined in *Gwaltney* that citizen suit provisions in federal environmental statutes allow ongoing harms to be enjoined, but do not provide a remedy for harms wholly past. Under this Court's opinion in *Gwaltney*, the "most natural reading" of the phrase "may present an imminent and substantial endangerment" in RCRA is that the citizen-plaintiff must allege an ongoing state of endangerment. Congress could have phrased its requirement in language that looked to the past ("may have presented"), but it did not choose this "readily available option." *See, Gwaltney*, 484 U.S. at 57. The Ninth Circuit's conclusion that Respondents could bring suit under RCRA for a harm that had been fully eliminated over three years before Respondent commenced this

suit directly conflicts with this Court's determination in *Gwaltney*.[10]

C. The Ninth Circuit's Interpretation Of 42 U.S.C. § 6972(a)(1)(B) Will Likely Also Conflict With The Impending Eighth Circuit Decision In *Furrer v. Brown*

A case which presents the same issues decided by the Ninth Circuit herein is now before the Eighth Circuit Court of Appeal. *Furrer v. Brown*, No. 94-3281 EMSL. The *Furrer* case was argued on April 12, 1995. Counsel for one of the defendants in that case indicates that argument before the Eighth Circuit panel focused primarily on the then recently issued opinion of the Ninth Circuit herein. Counsel also indicates that the Eight Circuit panel questioned whether a cost reimbursement action was available to citizen plaintiffs under RCRA and in particular questioned the substantial reliance of the Ninth Circuit on a prior decision issued by the Eighth Circuit Court of Appeal, *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373 (8th Cir. 1989). It appeared to counsel that the Eighth Circuit may reach a result opposite to that of the Ninth Circuit.

Counsel in *Furrer v. Brown* also advises that the Eighth Circuit has already issued opinions in other cases that were argued on April 12, 1995 and that a decision in *Furrer v. Brown* thus appears imminent. If *Furrer v. Brown* is decided during the pendency of this Petition, Petitioners anticipate filing a short supplemental paper addressing the decision.

---

[10] The "contributed/contributing" language and the "past and present handling" language of § 6972 make it clear that an action will lie for *conduct* that is either ongoing or wholly past. However, the "may present an imminent and substantial endangerment" language also makes it clear that an action will lie only if the *endangerment* is ongoing and not wholly past. In this case, the conduct in question is wholly past and the endangerment at issue is wholly past, having been cleaned up more than three years before suit was filed.

II. The Questions Presented Here Are Important Ones

No other reported decision in the 20 years since RCRA was enacted in 1976, or in the 11 years since RCRA was amended to add a cause of action for abatement of an imminent and substantial endangerment, has authorized a private party to sue for cost recovery under RCRA. Before the Ninth Circuit handed down its opinion herein, the remedies available to a private party seeking cost reimbursement for property contamination were well established. An aggrieved party had a full array of state common law and state statutory causes of action available to it.[11] In many instances, an aggrieved party could also sue in federal court for cost recovery under CERCLA. 42 U.S.C. § 9607(a). This has been the state of the law over the course of the lengthy development of property contamination litigation.

The Ninth Circuit's majority opinion swings open the doors of the federal courthouses to a plethora of new cost recovery suits. The threshold has apparently already been crossed by several current litigants. Counsel for Petitioners has received inquiries from counsel from all over the United States about the Ninth Circuit's decision. These counsel have repeatedly indicated that private party plaintiffs in ongoing litigation in which they were involved have recently amended their property contamination complaints to now add a cause of action under RCRA.

In addition, an authoritative trade publication has recently discussed this very trend under the headline *Court Ruling On Cost Recovery Under RCRA Spawns Raft of New Lawsuits*. Inside EPA Weekly Report, May 12, 1995 at 1-2. The article states that:

---

[11] The dispute between KFC and the Meghrigs serves as a good example of the availability of that array of remedies, since plaintiff pled causes of action in state court for: (1) statutory cost recovery, (2) tortious breach of statutory duty, (3) private nuisance, (4) public nuisance, (5) equitable indemnity, (6) unjust enrichment, (7) ultrahazardous activity, (8) negligence, and (9) unfair business practices. *KFC Western v. Meghrig*, 23 Cal.App.4th 1167, 28 Cal.Rptr.2d 676 (1994).

> The [Court of Appeals] decision has spurred a wave of new lawsuits and amendments to ongoing suits... One industry source says there are "dozens, and should be hundreds soon" of new cases in the Ninth Circuit, adding that the appeals court decision is "opening vast new vistas" of potential litigation, and "in another month or so, people will be giving seminars" on the new approach.

Because Congress never envisioned the RCRA citizen suit provision as a cost recovery mechanism, there is no express limitations period in the statute. As a result of the Ninth Circuit's decision, these private parties can now sue years and years after contamination has been discovered, and even years after it has been cleaned up. One area of environmental litigation that will be overwhelmingly impacted is cost recovery suits over gasoline leaks from underground storage tanks. Such suits were previously barred from the federal courts in most instances by the petroleum exclusion in CERCLA and were subject to state statutes of limitations. Now, however, such suits may be filed in federal court under RCRA with no express statute of limitations to be applied. Virtually every citizen plaintiff with a gasoline tank leak claim can now proceed to federal court, including those who have already been barred from proceeding in state court by state statutes of limitations.

The questions presented here are also important because the Ninth Circuit's decision effectively nullifies a set of congressionally mandated limitations on private party cost recovery actions embodied in the primary federal property contamination statute, CERCLA. CERCLA applies only to hazardous substances. A RCRA remedy would apply to *any solid* waste problem -- a much broader universe. As just noted, CERCLA excludes petroleum product from its list of hazardous substances. *Wilshire Westwood Assocs. v. Atlantic Richfield Corp.*, 881 F.2d 801 (9th Cir. 1989). Responsibility for petroleum contaminated property is in the hands of state enforcement agencies and state courts. The Ninth Circuit's decision would nullify this important aspect of the CERCLA petroleum exclusion -- it would allow petroleum cost recovery cases to be brought in federal court even though Congress and the courts

have determined otherwise under CERCLA.

In addition, CERCLA provides a mechanism for determining which costs expended by a plaintiff are recoverable. Only costs that are "necessary and consistent with the National Contingency Plan" are recoverable. 42 U.S.C. § 9607(a). The National Contingency Plan contains regulations on "hazardous substance response" that cover 29 pages in the Code of Federal Regulations. 40 C.F.R. §§ 300.400 - 300.440. Since Congress never envisioned response costs as being recoverable under RCRA, it is not surprising that RCRA, unlike CERCLA, provides no guidance on what types of response costs are recoverable under its citizen suit provision. Under the Ninth Circuit's holding, the courts will have to engage in extensive interstitial lawmaking to define which costs are recoverable in this highly technical area.

Finally, a statute of limitations has been specifically provided for CERCLA cost recovery actions. 42 U.S.C. § 9613(g). Again, because Congress never envisioned RCRA as a cost recovery mechanism, there is no express statute of limitations for RCRA citizen suit cost recovery actions. To simply assert, as the Ninth Circuit majority does (App. at A9), that the indefinite doctrine of *laches* may substitute for a definite statute of limitations is anomalous, to say the least, particularly in a context where, when Congress **did** expressly provide for cleanup cost recovery in CERCLA, Congress believed it important that the specificity of a fixed statute of limitations accompany such a remedy.

To create by judicial fiat a remedy for cost recovery under RCRA, unaccompanied by the protection of a fixed statute of limitations, runs very much against the scheme Congress intended to establish. This Court has held that the citizen suit is meant to supplement, not supplant, governmental action. *Gwaltney*, 484 U.S. at 60. However, by allowing a private plaintiff to recover its costs for cleaning up contamination under the RCRA citizen suit provision, the Ninth Circuit would wholly supplant governmental action in this sphere. In turn, an outcome that Congress steadfastly sought to avoid would surely follow: the overburdening of the federal courts with lawsuits seeking recovery of costs previously

expended to clean up waste problems -- solid and hazardous wastes -- of all types and sizes, without regard for whether the underlying danger is imminent or non-existent, and without any statutory limitations period, but only *laches* as a time constraint. App. at A9.

III. The Ninth Circuit Erred In Interpreting The Statute To Allow Private Parties To Sue For Monetary Relief

We have already detailed above the ways in which the Ninth Circuit's decision directly conflicts with this Court's decisions in *Sea Clammers* and *Gwaltney*. But there should be no doubt that, in other respects as well, the Ninth Circuit majority's ruling is seriously flawed analytically.

A. Under General Principles Of Statutory Interpretation, Neither The Plain Language Nor The Legislative History Of The RCRA Citizen Suit Provision Authorizes A Suit For Monetary Damages Or "Restitution"

As noted earlier, the plain language of the citizen suit provision of RCRA grants private parties the right to sue for prohibitory and mandatory injunctions. The legislative history of RCRA further demonstrates that Congress did not intend the RCRA citizen suit provision to include monetary relief. Most notably, in 1984, Congress amended the RCRA citizen suit provision to allow citizens to seek injunctions requiring responsible persons to abate "imminent and substantial endangerments" caused by the handling of solid or hazardous waste. The legislative history of the 1984 amendments stated that citizens would have "a limited right under Section 7002 [42 U.S.C. § 6972] to sue to *abate* an imminent and substantial endangerment." H.R. Rep. No. 198, 98th Cong., 2d Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612 (emphasis added.) It also explains the primary goal of § 6972(a)(1)(B) as "the *prompt abatement* of imminent and substantial endangerments." *Id.* (emphasis added.) Under basic principles of statutory interpretation, the Ninth Circuit has misanalyzed both the express terms of the statute and their legislative history.

B. The Ninth Circuit Improperly Implied A Damages Right Of Action For Citizen Plaintiffs

It is clear that the RCRA citizen suit provision does not expressly provide a money damages remedy. What the Court of Appeals has now created, then, is an implied right of action under the RCRA citizen suit provision.[12]

In *Cort v. Ash*, 422 U.S. 66, 78 (1975), this Court listed four factors which guide the process of determining whether implying a claim is consistent with Congressional intent.[13] The first consideration under *Cort* is whether the plaintiffs are members of a class for "whose *especial* benefit the statute was enacted." *California v. Sierra Club*, 451 U.S. 287, 293 (1981) (*quoting Cort*, 422 U.S. at 78, 80-82). RCRA is a statute designed to benefit the public at large by ensuring environmental safety, rather than

---

[12] The Court of Appeals did not label its construction an "implied right of action." The Court of Appeals instead interpreted the language of RCRA which provides for mandatory injunctive relief ("to order such person to take such other action as may be necessary") to allow a district court to order a defendant to pay over to a plaintiff in restitution that amount of money that the plaintiff had expended on its cleanup.

[13] "*First*, is the plaintiff one of the class for whose especial benefit the statute was enacted, that is, does the statute create a federal right in favor of the plaintiff? *Second*, is there any indication of such a remedy or to deny one? *Third*, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And *finally*, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?"

Cort, 422 U.S. at 95 (Emphasis Added).

The *Cort* factors are not of equal weight; the dispositive question is one of legislative intent. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 23-24 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-576 (1979).

focusing on any particular class or group. *City of Chicago v. Environmental Defense Fund*, __ U.S. __, 114 S.Ct. 1588, 1590 (1993); *accord California v. Sierra Club*, 451 U.S. 287, 295. KFC does not belong to a special class to which Congress intended to give special protections under RCRA, and this requisite for an implied right of action is not met.

The second consideration under *Cort* is whether there is any indication of legislative intent, explicit or implicit, to create a federal cause of action for private party recovery of cleanup costs. As noted elsewhere in this Petition, nothing in the RCRA legislative history in any way suggests that Congress intended to grant jurisdiction to district courts to adjudicate claims for recovery of cleanup costs under RCRA's citizen suit provision.

The third consideration under *Cort* is whether implying a cause of action for recovery of cleanup costs by a private plaintiff is consistent with the underlying purpose of RCRA. As this Court noted in *Sea Clammers*, a comprehensive and elaborate enforcement scheme, expressly created by Congress within a federal statute, reveals Congress' intent that the enforcement scheme it wrote was complete and exclusive. *See Sea Clammers*, 453 U.S. at 14. Like the FWPCA reviewed in *Sea Clammers*, RCRA contains a comprehensive and elaborate remedial scheme. The comprehensive character of RCRA's remedial scheme reflects Congress' intent not to authorize additional remedies. *See Sea Clammers*, 453 U.S. at 14.

The fourth consideration under *Cort* is whether the cause of action is one that is traditionally relegated to the states, such that it would be inappropriate to infer a cause of action based solely on federal law. Causes of action for recovery of cleanup costs or restitution have been developed by common law courts and by courts of equity for several centuries. *See* G. Palmer, *The Law of Restitution* §§ 1.1-1.8 (1978); D. Dobbs *Remedies* §§ 4.2-4.3 (1973). Common law courts of general jurisdiction, such as those of the states, have power to develop and elaborate further a cause of action for restitution, as well as the defenses to such a cause of

action, by applying general rules of decision to the facts of the cases before them. This task is uniquely suited to the state courts. Moreover, the law governing the duties of a property owner to a successor in title is also a matter historically determined by state law.

In sum, there is no justification for implying a damages right of action under RCRA when measured by the standards set forth in this Court's decision in *Cort v. Ash*.

C. The Relief That The Majority Opinion Would Provide Runs Counter To The Very Purpose of Citizen Suit Provisions

The entire concept of a citizen-plaintiff acting as a private attorney general clashes with the notion of such a plaintiff being able to receive monetary relief. As the District Court stated: "where the relief sought is to benefit the plaintiff rather than act for the public, the action is not within the scope or the purpose" of the citizen suit provision. App. A22 to A23. The earlier review in this Petition of the history of environmental citizen suit provisions reveals the essential purposes and limitations of these provisions. As an advocate of citizen suits recently noted:

> "A citizen suit is not a private tort remedy because citizens can only obtain an injunction and/or civil penalties payable to the U.S. Treasury, not damages for their own injuries. It is not a *qui tam* action because citizens do not recover a share of the penalties obtained."

Hecker, *The Citizen's Role in Environmental Enforcement*, Nat. Res. & Env. (Spring 1994) at 31.

D. The Ninth Circuit Erred In Interpreting The Statute To Authorize Relief For Harms Wholly Past

The RCRA citizen suit provision provides for relief as

against any person:

> "who has contributed or who is contributing to the past or present handling . . . of any solid or hazardous waste *that may present* an imminent and substantial endangerment to human health or the environment."
> 42 U.S.C. § 6972(a)(1)(B) (emphasis added).

The statute clearly requires that the endangerment be *imminent*, even if the acts which caused it occurred in the past.

Other subsections of RCRA conclusively demonstrate that the imminent danger at issue must be ongoing at the time suit is filed. First, the notice requirement contained in the RCRA citizen suit provision requires the citizen-plaintiff to provide notice of intent to file suit to: the defendant(s), the Administrator of EPA and the appropriate state 90 days prior to filing. 42 U.S.C. § 6972(b)(2)(A). Such a provision is gratuitous if citizen suits are permitted to target wholly past violations. *Gwaltney*, *supra*, at 59-60.

In addition, RCRA completely bars a citizen suit where the EPA has taken action following receipt of the required 90 day notice. To allow citizen suits for past violations where the statute provides a complete bar to citizen suits in this type of situation would undermine the supplementary nature of the citizen suit. *Gwaltney* at 60.[14] The Court of Appeals majority's reasoning totally undermines the supplemental nature of the RCRA citizen suit. Citizen-plaintiffs can simply clean up a solid waste problem without prior notice to any governmental entity or potential defendant. Then, as occurred in this case, the citizen-plaintiff can provide the requisite notices years after the cleanup had been completed and proceed to file suit 90 days later. Whatever

---

[14] The Court of Appeals did not address this portion of *Gwaltney*, although the dissent did and found it persuasive in urging affirmance of the lower court's decision.

governmental role Congress had envisioned is surely supplanted under this scenario.

CONCLUSION

The Ninth Circuit majority has implied a damages remedy for citizen-plaintiffs under RCRA where none was provided for in the statute, where Congress evinced no intent to so provide and where the effect is to render supporting provisions of the statute meaningless. That is contrary to the prior clear pronouncements of this Court in *Sea Clammers* and *Gwaltney* and likely conflicts with an impending decision of the Eighth Circuit as well. The flood of new federal court litigation which has already been spawned by the Ninth Circuit's decision can be expected to increase exponentially. For these and all of the other reasons set forth in this Petition, we respectfully petition this Court to issue a writ of certiorari to review the decision of the Ninth Circuit below.

Dated: July 13, 1995.

Respectfully submitted,

JOHN P. ZAIMES
Counsel of Record

CLIFTON J. MCFARLAND
McCLINTOCK, WESTON,
BENSHOOF, ROCHEFORT,
RUBALCAVA & MacCUISH
444 South Flower Street, 43rd Floor
Los Angeles, California 90071
(213) 623-2322
Counsel for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Argued: April 5, 1994 Decided: March 1, 1995

Docket No. 92-56597

KFC WESTERN, INC.,

Plaintiff-Appellant,

-against-

ALAN MEGHRIG and MARGARET MEGHRIG,

Defendants-Appellees.

Before: BROWNING, PREGERSON and BRUNETTI, Circuit Judges.

PREGERSON, Circuit Judge:

KFC Western, Inc. ("KFC") appeals the district court's dismissal of its action under the Resource Conservation and Recovery Act ("RCRA") to recover environmental clean-up costs from the prior owners of contaminated property sold to KFC. The district court dismissed KFC's action under Federal Rule of Civil

Procedure 12(b)(6) because it concluded that RCRA § 7002, codified at 42 U.S.C. § 6972(a)(1)(B), does not authorize private plaintiffs to collect a restitutionary remedy. We have jurisdiction under 28 U.S.C. § 1291. We reverse and remand.

BACKGROUND

In September 1975, Alan and Margaret Meghrig (the "Meghrigs") sold real property to KFC, which continues to own and operate a Kentucky Fried Chicken franchise on the property. Unbeknown to KFC, underground soil at the property was contaminated with elevated levels of refined petroleum products (lead and benzene) at the time of the sale. The contamination allegedly resulted from the Meghrigs' negligence in operating a gasoline station on the property. The Meghrigs never informed KFC about the contamination.

In October 1988, in the course of improving the property, KFC discovered the contaminated soil. The City of Los Angeles Department of Building and Safety issued a corrective notice ordering KFC to stop all construction on the property pending analysis of the soil and clearance from the County of Los Angeles Department of Health Services (the "DHS"). Analysts confirmed the presence of elevated levels of refined petroleum in the soil. Although KFC neither caused the contamination nor owned the property when the contamination occurred, the DHS ordered KFC to clean up the property. KFC spent over $211,000.00 to assess and remove the contaminated soil for off-site disposal. KFC completed the clean-up in 1989 and, in June 1990, asked the Meghrigs to reimburse the costs. The Meghrigs refused.

On May 29, 1992, KFC filed a complaint in district court against the Meghrigs under RCRA § 7002, codified at 42 U.S.C. § 6972(a)(1)(B), for restitution of the expended clean-up costs. The Meghrigs filed a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss the complaint, offering two reasons why KFC's action did not come within the RCRA citizen suit provision: (1) there was no "imminent and substantial endangerment" because KFC had completed the clean-up three years before filing, and (2) RCRA

authorized suits for injunctive relief only, not for damages. The district court granted the Meghrigs' motion and granted KFC leave to amend its complaint.

KFC filed an amended complaint which alleged that the contaminated soil, at the time of clean-up, presented an "imminent and substantial endangerment" to public health and the environment by threatening surrounding groundwater and potentially risking the health of people expected to use the property and the KFC franchise. RCRA § 7002, codified at U.S.C. § 6972(a)(1)(B). Also, KFC stated that its damages claim was actually a claim for "equitable restitution." Upon the Meghrigs' renewed motion, the district court dismissed the amended complaint. In its dismissal order, the district court stated that 42 U.S.C. § 6972(a)(1)(B) authorizes only injunctive or other equitable relief and only in cases involving an existing, imminent danger to public health or the environment. KFC appeals.

ANALYSIS

We review *de novo* a dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). *Oscar v. University Students Co-op. Ass'n*, 965 F.2d 783, 785 (9th Cir.) (*en banc*), *cert. denied*, _ U.S. _, _ , 113 S.Ct. 655, 656, 121 L.Ed.2d 581 (1992). In reviewing such a dismissal, our review is limited to the contents of the complaint, *Buckey v. County of Los Angeles*, 968 F.2d 791, 794 (9th Cir.), *cert. denied*, _ U.S. _, 113 S.Ct. 599, 121 L.Ed.2d 536 (1992), and we must take as true all allegations of material fact and construe them in the light most favorable to the plaintiff, *Oscar*, 965 F.2d at 785.

This appeal presents us with a question of first impression -- whether the RCRA citizen suit provision authorizes a private plaintiff to collect restitution of clean-up costs. The RCRA citizen suit provision provides:

> [A]ny person may commence a civil action on his own behalf ... against any person . . . including any

> . . . past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which *may present an imminent and substantial endangerment* to health or the environment[.]
>
> . . . . .
>
> The district court shall have jurisdiction ... to *restrain* any person who *has contributed* or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in [§ 6972(a)(1)(B) (the endangerment provision)] [and] to *order such a person to take such other action as may be necessary*, or both....

RCRA § 7002, codified at 42 U.S.C.A. § 6972(a)(1)(B) and § 6972(a) (West 1984 & Supp.1993) (emphasis added).

The parties dispute initially whether, for purposes of § 6972(a)(1)(B), "imminent and substantial endangerment" must exist at the time the plaintiff files a complaint or may exist at the time of clean-up. The Meghrigs urge us to adopt the district court's reasoning that § 6972(a)(1)(B) authorizes citizen suits only if contamination poses an imminent and substantial endangerment at the time the plaintiff files the complaint. Because KFC completed the clean-up of the property three years before commencing this lawsuit, the Meghrigs argue that KFC has no remedy under RCRA. The result urged by the Meghrigs is supported by certain comments in the legislative history that explain the meaning of the term "imminence." "Imminence in this section applies to the nature of the threat.... The section, therefore, may be used for events which took place at some time in the past but *which continue to present a threat* to the public health or the environment." Staff of House Subcommittee on Oversight and Investigation, Committee on Interstate and Foreign Commerce, 96thCong., 1st Sess., Hazardous

Waste Disposal 32 (Comm. Print 96-IFC 31, 1979) ("Eckhardt Report") (emphasis added). See *Dague v. City of Burlington*, 935 F.2d 1343, 1356 (2d Cir.1991) (finding an "imminent hazard" requires proof that a risk of harm is present), *rev'd in part on other grounds*, __ U.S. __ , 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992); *United States v. Price*, 688 F.2d 204, 214 (3d Cir.1982) (noting that imminent danger existed at the time of the district court's hearing).[1]

Nonetheless, we agree with KFC that RCRA authorizes citizen suits with respect to contamination that in the past posed imminent and substantial danger. We choose to follow the Eighth Circuit's interpretation of RCRA § 7003, codified at 42 U.S.C. § 6973, which authorizes suits by the Administrator of the Environmental Protection Agency ("EPA"), and which is worded virtually identically to § 6972(a)(1)(B).[2] The Eighth Circuit reads

---

[1] The Meghrigs also cite *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987) (Clean Water Act case) and *McClellan Ecological Seepage Situation v. Weinberger*, 707 F.Supp. 1182, 1187 (E.D.Cal.1988) (dismissing for mootness a RCRA action under § 6972(a)(1)(A)), which are inapposite. Both cases explain only that citizen suit provisions not at issue here do not apply retroactively to allow an action against a defendant who violated a statutory obligation in the past, if the defendant no longer allegedly is "in violation." In contrast, § 6972(a)(1)(B) applies both prospectively and retrospectively, to persons who contributed in the past to current endangerment. *See Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1159 (9th Cir.1989) (citing *Gwaltney*, 484 U.S. at 57 & 58 n. 2, 108 S.Ct. at 381 & 382 n. 2, wherein the Supreme Court described the section as one where "Congress has demonstrated . . . that it knows how to avoid [limiting a statute to prospective application] by using language that expressly targets past violations").

[2] Specifically, § 6973 provides:

> [U]pon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste *may present an imminent and substantial endangerment* to health or the environment, the Administrator may bring suit ... against any person . . . who has contributed or who is contributing to such handling, storage, treatment,

(continued...)

the imminent endangerment requirement as "limit[ing] the reach of RCRA to sites where the potential for harm is great" but not as limiting the time for filing an action. *United States v. Aceto Agric. Chemicals Corp.*, 872 F.2d 1373, 1383 (8th Cir.1989).

In *Aceto Agric. Chemicals Corp.*, the Eighth Circuit, when it reversed a Federal Rule of Civil Procedure 12(b)(6) dismissal order, addressed and rejected the same arguments that the Meghrigs make here. The defendants in the Eighth Circuit case argued that because the plaintiff (EPA) cleaned up the site before bringing suit, the required "imminent and substantial endangerment" did not exist. The court concluded that the language of RCRA "does not require the EPA to file and prosecute its RCRA action *while* the endangerment exists." *Id.* The court explained that RCRA's purpose "is to 'give broad authority to the courts to grant all relief necessary to ensure complete protection of the public health and the environment. The limitation urged by defendants would defeat this purpose,'" would be an "absurd and unnecessary" requirement. *Id.* (citations to quoted material omitted).

We also agree with KFC that RCRA authorizes a restitutionary remedy under these circumstances. KFC's action to collect restitution of clean-up costs falls within the statutory allowance for district court orders that defendants take "such other action as may be necessary...." 42 U.S.C. § 6972(a) ("The district court shall have jurisdiction . . . to restrain any person who has contributed or who is contributing to [an imminent and substantial endangerment], to *order such person to take such other action as may be necessary*, or both....") (Emphasis added). We reject the Meghrigs' contention that the statute entitles citizens to obtain only an injunction or other equitable relief that is not the equivalent of compensatory money damages.

---

[2](...continued)

transportation or disposal to *restrain* such person from [such activity], to *order such person to take such other action as may be necessary*, or both....

42 U.S.C.A. § 6973 (West 1984 & Supp.1993) (emphasis added).

Because Congress intended that citizen suits be governed by the same standards of liability as governmental actions,[3] and because it worded the provisions almost identically, we choose to interpret similarly the relief available under the two provisions. The Eighth Circuit has recognized the Administrator's right to sue under § 6973 for restitution of costs incurred. *See, e.g., Aceto Agric. Chemicals Corp.*, 872 F.2d at 1383 (Administrator may collect reimbursement after government cleaned up contaminated property); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726 (8th Cir.1986) (Administrator may collect an equitable award of abatement costs from persons who non-negligently contributed to endangerment), *cert. denied*, 484 U.S. 848, 108 S.Ct. 146, 98 L.Ed.2d 102 (1987). The Third Circuit also has stated that "[r]eimbursement could ... be directed against those parties ultimately found to be liable" after the EPA itself funded a diagnostic study of contaminated property. *Price*, 688 F.2d at 214 (holding that district court could have granted the Administrator a preliminary injunction to obtain funding for diagnostic study).

---

[3] H.R.Rep. No. 198, 98th Cong., 2d Sess., pt. 1, 53 (1983), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612. The legislative history for the 1984 RCRA Amendments suggests that when Congress added the endangerment provision it did not intend to grant a narrower right of action to citizens than to the Administrator, who is authorized (according to persuasive out-of-circuit case law, discussed *infra*) to bring reimbursement actions. Nothing indicates that Congress intended citizen suits to serve a purpose different from that served by governmental actions. The House Committee on Energy and Commerce explained in its report that citizens have a limited right to sue in endangerment cases "pursuant to the standards of liability established under Section 7003 [42 U.S.C. § 6973, Administrator's right of action]" and only if the Administrator, after receiving notice, fails to file an action. *Id.* "The committee believes [the] expansion of the citizen suit provision will complement ... the Administrator's efforts to eliminate threats as to public health and the environment, particularly where the Government is unable to take action because of inadequate resources." *Id.*

Still, the legislative history cuts both ways because other language supports the Meghrigs' contention that Congress intended to allow citizens to sue only for injunctions when it added the endangerment provision. The House Committee stated that citizens have a "limited right . . . to sue to abate an imminent and substantial endangerment." *Id.* (emphasis added).

We are not persuaded by the Meghrigs' contention that material differences exist between the substantially identical citizen suit provisions in § 6972(a)(1)(B) and § 6973, so as to justify affording restitutionary relief only to the Administrator. The Meghrigs focus first on the different notice requirements for filing actions.[4] The Administrator may bring an action "upon receipt of evidence" of the requisite endangerment, and the statute does not preclude actions filed by the Administrator without notice. *See* 42 U.S.C. § 6973(a). On the other hand, a private plaintiff cannot commence an action without giving ninety days' notice to the Administrator, the State, and to any alleged contributor to the endangerment. *See* 42 U.S.C. § 6972(b)(2)(A); *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1159 (9th Cir.1989). Notice by a private plaintiff might encourage certain polluters to abate harmful conduct to obviate an expensive law suit. Still, there is no inconsistency between a notice requirement and the recovery of clean-up costs from past polluters.[5] Requiring notice of a citizen suit restitution action still serves certain interests of the EPA and the states by notifying them that endangerment was corrected and that the polluters are being held accountable. Furthermore, even the Administrator must provide immediate notice of hazardous waste endangerment to the appropriate local governmental agencies, *see* 42 U.S.C. § 6973(c), and no courts have treated this notice requirement as a basis for refusing to allow governmental restitution

---

[4] Compliance with the citizen suit notice requirement, *infra*, is not an issue on appeal.

[5] Section 6972(a)(1)(B) permits private actions against persons who in the past contributed to current endangerment, even though they no longer engage in conduct that requires abatement. Because § 6972(a)(1)(B) applies retroactively in some cases, we do not import into our analysis the Supreme Court's discussion in *Gwaltney* on the significance of a notice requirement. 484 U.S. at 60-61, 108 S.Ct. at 383 (rejecting a statutory interpretation that would render notice gratuitous because one purpose of notice is to give an alleged violator an opportunity to bring itself into compliance with federal requirements and thereby render unnecessary a citizen suit). As explained *supra* in note 1, the *Gwaltney* case concerned a different statute which only applies to persons alleged to be *currently* in violation of federal obligations.

actions.

The Meghrigs also argue that the lack of a limitations period for RCRA citizen suits is evidence of the unavailability of reimbursement actions under RCRA. They argue that it would be problematic for us to conclude that private citizens can file suit many years after they complete clean-up of once-imminent endangerment. Congress provided a limitations period in other statutes, such as the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), when it expressly authorized actions to recover response costs, 42 U.S.C. § 9612(d)(1) (West 1986 & Supp.1993) (claim to recover clean-up costs must be made within six years after the completion of all response action). Instead, in RCRA, Congress provided that private plaintiffs retain the right "to seek any other relief" available "under any statute or common law.... " *See* 42 U.S.C. § 6972(f). We do not see this as a problem. By applying equitable defenses such as laches, courts can alleviate any unfairness that might be created by the lack of a limitations period for RCRA citizen suits.

We have found no principled reason to distinguish between the relief available to the Administrator and that available to private plaintiffs under the virtually identical statutory provisions. Nor are we persuaded by the case law cited by the Meghrigs. Some circuit courts have held that citizens cannot bring reimbursement actions because RCRA authorizes only preventive, rather than compensatory relief. See *Walls v. Waste Resource Corp.*, 761 F.2d 311, 316 (6th Cir.1985) (refusing to imply a private right of action for damages); *Environmental Defense Fund, Inc. v. Lamphier*, 714 F.2d 331, 337 (4th Cir.1983) (affirming award of injunctive relief because plaintiffs were "acting as private attorneys general rather than pursuing a private remedy [for damages]"). These decisions are inapposite because they do not address private actions like KFC's action, brought under § 6972(a)(1)(B). Rather, they concern actions brought under the predecessor to § 6972(a)(1)(A), formerly 42 U.S.C. § 6972(a), which authorized actions to "enforce" a requirement against any person alleged to be currently "in violation" of the requirement. *Cf.* § 6972(a)(1)(B) (allowing actions against

any contributor, past or present, to an imminent and substantial endangerment).

Furthermore, we disapprove of the reasoning used by district courts that have dismissed complaints brought under § 6972(a)(1)(B) to the extent the plaintiffs sought reimbursement of clean-up costs. *See Kaufman and Broad-South Bay v. Unisys Corp.*, 822 F.Supp. 1468 (N.D.Cal.1993) (refusing to follow cases interpreting § 6973 to afford a restitution remedy to the Administrator, and relying on *Walls*, and *Commerce Holding Co. v. Buckstone*, 749 F.Supp. 441 (E.D.N.Y.1990)); *Commerce Holding Co.*, 749 F.Supp. at 445 (Although plaintiff characterized complaint as a request for "equitable relief in the form of [clean-up cost] reimbursement," court construed it as one for damages, stating that the complaint failed even if treated as a request for equitable relief because the plaintiff "would be the direct beneficiary of the substantive relief."). Because we choose to follow the Eighth Circuit's rule that the Administrator may sue for equitable restitution of costs, we now allow such suits by private plaintiffs under § 6972(a)(1)(B).

It would be unfair and poor public policy to interpret § 6972(a)(1)(B) as barring restitution actions. By doing so, we would make the citizen suit remedy meaningless in most cases for the very citizens who most deserve the remedy, namely innocent citizens, like KFC, who have a financial stake in the contaminated property as well as potential and actual clean-up liability. As in this case, the government often orders innocent parties, so-called "responsible parties" under the statute, to remedy discovered contamination on their property even though they did not cause the contamination or have any ties to the property when the contamination occurred. When the government orders cleanup, the innocent citizen must respond expeditiously to the order. There is no time to sue for "other equitable relief" in the form of a mandatory clean-up injunction against past polluters who may or may not still be on the scene.

CERCLA and state law do not provide an adequate

substitute source of relief for these innocent citizens.[6] In practice, an interpretation of § 6972(a)(1)(B) that afforded only injunctive relief, not compensation, would make the remedy available only to concerned outsiders, who can never be held responsible for environmental clean-up. We would foreclose a RCRA remedy for the innocent buyers who clean up contaminated property.

In fact, it is even more important for private citizens, as compared to the EPA Administrator, to have a restitutionary remedy under RCRA. A private citizen often cannot control the timing of clean-up actions but, rather, must clean the contaminated property whenever the government obtains an appropriate order. Even the innocent private party, like KFC, who purchases already-contaminated property, often must clean the property immediately and recover secondarily from the actual polluter. The Administrator, on the other hand, can control the timing of clean-up actions and impose the clean-up burden on the polluters or other "responsible parties" in the first instance. The right to reimbursement becomes important to the Administrator only when contamination requires prompt attention, which is always the case for private citizens who are ordered to remedy contamination. As the Third Circuit has recognized, public-policy concerns might

---

[6] KFC has no remedy under CERCLA because CERCLA's petroleum exclusion covers refined petroleum products such as gasoline and therefore bars a lawsuit to recover response costs occasioned by its release; *See Cose v. Getty Oil Co.*, 4 F.3d 700, 704 (9th Cir.1993) (CERCLA excludes refined petroleum from its definition of "hazardous substance"); *Wilshire Westwood Assocs. v. Atlantic Richfield Corp.*, 881 F.2d 801, 810 (9th Cir.1989) (same). Due to a similar petroleum exclusion in California's Hazardous Substance Account Act, KFC also has no statutory state law remedy. *KFC Western, Inc. v. Meghrig*, 23 Cal.App.4th 1167, 28 Cal.Rptr.2d 676, 682 (1994). KFC might be able to state common law claims for private continuing nuisance and continuing trespass based on the Meghrigs' allegedly tortious contamination of the soil. *See id.*, 28 Cal.Rptr.2d at 685 (reversing dismissal and remanding to allow KFC to amend its complaint). Even though causes of action for nuisance, trespass, and potential negligence are available to plaintiffs such as KFC, tort remedies are generally inadequate because of the difficulties of proof and attendant court delays.

favor allowing a plaintiff to clean contaminated property first and seek reimbursement later. *See Price*, 688 F.2d at 214 ("Prompt preventive action [is] the most important consideration."). We therefore hold that § 6972(a)(1)(B) entitles KFC to bring a restitution action. REVERSED AND REMANDED.

BRUNETTI, Circuit Judge, dissenting:

Because I believe that RCRA § 7002, 42 U.S.C. § 6972(a)(1)(B), does not contemplate actions for restitution when there is no "imminent and substantial endangerment" at the time of suit, I must dissent from the majority's opinion.

The majority's main argument is that because the Eighth Circuit allowed the administrator to bring an action for restitution under § 6973, private citizens should be permitted to bring actions for restitution under *§ 6972(a)(1)(B)* since those two sections are worded virtually identically. In *United States v. Aceto Agric. Chemicals Corp.*, 872 F.2d 1373, 1383 (8th Cir.1989) (emphasis in original), the Eighth Circuit held that "RCRA's 'imminent and-substantial endangerment' language does not require the EPA to file and prosecute its RCRA action *while* "the endangerment exists." The court found that "in the context of a reimbursement action, this would be an 'absurd and unnecessary' requirement. The endangerment language is plainly intended by Congress to limit the reach of RCRA to sites where the potential for harm is great." *Id.* at 1383. The court concluded that requiring an "imminent and substantial endangerment" at the time of suit would defeat RCRA's purpose to "give broad authority to the courts to grant all relief necessary to ensure complete protection of the public health and the environment." *Id.* (quotations omitted).

The Eighth Circuit's decision *assumes* without deciding that RCRA § 6973 provides for reimbursement actions. Looking at the two issues presented in the instant action makes this clear. Those two issues are: (1) whether RCRA requires an "imminent and substantial endangerment" at the time of filing suit, and (2) whether § 6972 is limited to injunctive, rather than restitutionary, relief.

Although the two issues are intertwined, allowing an action for restitution *after* a site has been cleaned up requires an affirmative answer to both questions. If the answer to either question is no, then the answer to the other question should also be no. Instead of addressing both questions under the statute, the Eighth Circuit assumed that RCRA permits reimbursement actions.

The majority adopts the Eighth Circuit's decision in *Aceto* without discussing its assumption that § 6973 permits reimbursement actions. This approach undermines the plain language of § 6972(a)(1)(B). Therefore, I disagree with the majority's unquestioning adoption of *Aceto*.[1]

The majority relies on the language in § 6972(a)(1)(B), allowing the district court to restrain any person ... [or] order such person to take *such other action as may be necessary*, or both ...." to conclude that actions for reimbursement are contemplated by the statute. The majority finds KFC's action for restitution permissible, because it concludes that the language, "such other actions as may be necessary," allows the district court to award whatever relief it deems necessary.

I disagree, however, because I believe that the language, "such other action as may be necessary," does not contemplate actions for reimbursement. The legislative history suggests that reimbursement actions are not permitted and that an "imminent and substantial endangerment" must exist at the time of filing suit. The House Committee stated that citizens have "a limited right under Section 7002 to sue to *abate* an imminent and substantial

---

[1] I agree with the majority that § 6973 and § 6972(a)(1)(B), which are worded identically, should be interpreted the same. The legislative history supports this conclusion. *See* H.R.Rep No. 198, 98th Cong., 2d Sess. 53 (1984), reprinted in, 1984 U.S.C.C.A.N. 5576, 5612, (citizens have right to sue "pursuant to the standards of liability established under Section 7003 [42 U.S.C. § 6973]"). However, because *Aceto* does not address the issue of reimbursement, I do not believe that the majority should rely on it to include actions for restitution within the scope of § 6972(a)(1)(B).

endangerment." H.R.Rep. No. 198, 98th Cong., 2d Sess. 53 (1984), *reprinted in*, 1984 U.S.C.C.A.N. 5576, 5612 (emphasis added). It also explains the primary goal of § 6972(a)(1)(B) as "the *prompt abatement* of imminent and substantial endangerments." *Id.* (emphasis added). Therefore, the majority's decision contravenes the plain language of the statute and the legislative history.

As to the "imminent and substantial endangerment requirement," the language of the statute suggests that it must exist at the time the private citizen files suit. Section 6972(a)(1)(B) allows suit against "any person . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation or disposal of any solid or hazardous waste which *may present an imminent and substantial endangerment to health or the environment*." This unambiguous language requires that the endangerment must be occurring at the time of filing suit. Only if the statute had read "may or *may have* presented" would it have implied that § 6972(a)(1)(B) permits reimbursement actions for an endangerment that had already cleaned up.

Moreover, the notice requirement under § 6972 supports the requirement - that an "imminent and substantial endangerment" must be present at the time of filing suit. Under § 6972(b)(2)(A)(i), a private citizen seeking to file suit under § 6972(a)(1)(B) must give notice to the administrator and cannot file suit for 90 days after giving such notice. The purpose of this notice requirement is to give the administrator the opportunity to bring suit itself, since under § 6972(b)(2)(B), a private citizen cannot bring suit if the administrator has initiated its own suit. Thus, the notice requirement and the fact that the administrator has the first and exclusive opportunity to bring suit suggest that § 6972 does not permit reimbursement actions and requires an "imminent and substantial endangerment" at the time of filing suit.

The majority argues that "there is no inconsistency between a notice requirement and recovery of clean-up costs from past polluters." See Opinion at 522. It finds that notice in a reimbursement action "still serves certain interests of the EPA and

the states by notifying them that endangerment was corrected and that the polluters are being held accountable." *Id.* However, the majority stretches the effects of the notice requirement too far, since all notice according to the majority's policy rationales really accomplishes is informing the EPA that *certain alleged polluters are being sued by a private citizen*. In addition, the majority states that "the Administrator must provide immediate notice of hazardous waste endangerment to the appropriate local governmental agencies, *see* 42 U.S.C. § 6973(c), and no courts have treated this notice requirement as a basis for refusing to allow governmental restitution] actions." *See* Opinion at 522. However, this rationale is inapposite, since the purpose of the notice requirement in § 6972(a)(1)(B) is to allow the administrator to bring suit instead of the private citizen. See H.R.Rep. No. 198, 98th Cong., 2d Sess. 53 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612 (The private citizens' right to sue "can only be exercised if the Administrator (following notice of the intended litigation) fails to file an action under 7003."). In contrast, the purpose of the notice requirement in § 6973(c) is not to have the local government agencies bring suit before the administrator. Thus, I believe that the majority uses faulty reasoning to obfuscate the fact that the notice requirement for private citizens shows that § 6792(a)(1)(B) does not permit reimbursement actions and requires an "imminent and substantial endangerment" at the time of filing suit.

The majority also dismisses without support the fact that RCRA lacks any statute of limitations for actions under § 6972(a)(1)(B). Because no statute of limitations exists under § 6972(a)(1)(B), if reimbursement actions are allowed, private citizens, like the KFC owners in this case, can bring suit against past contributors many years after cleaning up the contamination. This case is a prime example. The KFC owners brought the property from the Meghrigs in 1975. KFC did not discover the contamination until October 1988. KFC cleaned up the property in 1989. Then in June 1990, it asked the Meghrigs to reimburse its costs. Not until 1992 did KFC bring suit under RCRA. This course of events illustrates the problem that if reimbursement actions are permitted, private citizens will be able to sue past contributors many

years after the contamination and clean-up. Thus, the lack of a statute of limitations supports the fact that § 6972(a)(1)(B) does not contemplate reimbursement actions when there is no "imminent and substantial endangerment."

The majority recognizes the lack of limitations period and attempts to reconstruct Congressional intent to conclude that Congress did not intend for RCRA to have a statute of limitations. It notes that "Congress provided a limitations period in other statutes such as [CERCLA] when it expressly authorized actions to recover response costs.... " *See* Opinion at 522. It uses this fact to conclude that "[i]nstead, in RCRA Congress provided that private plaintiffs retain the right 'to seek any other relief' available 'under any statute or common law' [under § 6972(f)]." This conclusion is illogical this is not an "instead" and does not indicate that Congress chose a statute of limitations period for CERCLA but not for RCRA. As the majority concedes, CERCLA included a statute of limitations "when it *expressly* authorized actions to recover response costs." *Id.* (emphasis added). This does not imply that because Congress included no statute of limitations in § 6972(a)(1)(B), it provided for reimbursement actions brought by private citizens at any time, unless barred by laches. *Id.* In fact, the lack of limitations period in RCRA in contrast to the limitations period in CERCLA and the express authorization for recovery of response costs suggests that Congress did not contemplate reimbursement actions in RCRA.

Furthermore, the majority finds support in § 6972(f), which provides that

> [n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to *seek any other relief* (including relief against the Administrator or a state agency).

§ 6972(f) (emphasis added). This section does not limit the type of relief available; however, it in no way suggests that a private citizen has a cause of action *under RCRA* for reimbursement of clean-up costs from a prior "imminent and substantial endangerment." It simply gives a person the right to bring any claim allowable under state or federal law.

The majority then states that it has "found no principled reason to distinguish between the relief available to the Administrator and that available to private plaintiffs under the virtually identical statutory provisions." *See* Opinion at 523. However, other than the Eighth's Circuit's decision in *Aceto*, which assumes reimbursement actions are permissible, the majority has offered no support for its conclusion that an "imminent and substantial endangerment" need not exist at the time of filing suit.

The majority's citation to *United States v. Price*, 688 F.2d 204 (3d Cir.1982) is wholly unpersuasive. In *Price*, the court did state that in the case before it "[p]rompt preventive action was the most important consideration. Reimbursement could thereafter be directed against those parties ultimately found to be liable." *Id.* at 214. However the court did not state that reimbursement would be available under RCRA § 6973. In addition, the court also stated that RCRA "authorizes the clean-up of a site, even a dormant one, if that action is necessary to abate a *present* threat to the public health or the environment." *Id.* (emphasis added). It also cited the Eckhardt Report which describes § 6973:

> The section's broad authority to "take such other actions as may be necessary" includes both *short- and long-term injunctive relief*, ranging from the construction of dikes to the adoption of certain treatment technologies, upgrading of disposal facilities, and removal and incineration. Imminence in this section applies to the nature of the threat rather than identification of the time when the endangerment initially arose. The section, therefore, may be used for events which took place at some

time in the past but which *continue to present a threat to the public health or the environment.*

Id. at 213. Therefore, *Price* does notsupport suits under § 6973 for reimbursement when no "imminent and substantial endangerment" exists at the time of filing.

The majority also summarly rejects district court cases which have dismissed cases for reimbursement under § 6972(a)(1)(B). *See Kaufman and Bread-South Bay v. Unisys Corp.*, 822 F.Supp. 1468, 1477 (N.D.Cal.5 1993) ("While injunctive relief is available under § 6972(a)(1)(B), the statute does not provide a private action for damages. Nor should one be implied.... [Although the Eighth Circuit allowed a reimbursement action under § 6973, other] cases persuasively argue against implying a private remedy for damages or restitution."); *Commerce Holding Co. v. Buckstone*, 749 F.Supp. 441 (E.D.N.Y.1990) (injunctive relief available under § 6972(a)(1)(B) not damages and court will not imply right to private action for damages). Although these case are more directly on point because they interpret § 6972(a)(1)(B), the statute at issue in this case, the majority dismisses them and chooses to follow *Aceto* from the Eighth Circuit which involved § 6973.

The majority also finds *Walls v. Waste Resource Corp.*, 761 F.2d 311 (6th Cir.1985), and *Environmental Defense Fund, Inc. v. Lamphier*, 714 F.2d 331 (4th Cir.1983), unpersuasive because they addressed actions brought under the predecessor to § 6972(a)(1)(A), "which authorized actions to 'enforce' a requirement against any person alleged to be currently 'in violation' of the requirement." *See* Opinion at 523. While the majority is correct that these cases did interpret another subsequently amended statute, it fails to recognize that the main difference between the prior statute and § 6972(a)(1)(B), the statute at issue in this case, is that under § 6972(a)(1)(B), private citizens can sue *past* contributors. This allows private citizens to require past contributors to clean-up sites, even if those past contributors are no longer contributing to the "imminent and substantial endangerment." It does not, however, imply that private citizens can sue past contributors for

reimbursement. Thus, while *Walls* and *Environmental Defense Fund* do not directly support the fact that § 6972(a)(1)(B) does not contemplate reimbursement actions, the fact that courts under § 6972(a) (now amended and § 6972(a)(1)(A)) would not imply private rights of action for damages indirectly could lend credence to the theory that those actions should not be permitted under either § 6972(a)(1)(B) or § 6973.

The majority's final arguments in favor of reimbursement actions under § 6972(a)(1)(B) are based on public policy. It recognizes that private citizens may not have time to bring actions for a mandatory clean-up injunction against past polluters before cleaning up as ordered by the government. This may be true, but we should not make a legislative determination that because some private citizens will not have time to bring suit before cleaning up as ordered, reimbursement actions should be implied under § 6972(a)(1)(B). In addition, there is nothing in the record in this case that indicates that KFC could not bring suit against the Meghrigs before clean-up at the time they discovered the contamination. The majority speculates--theoretically, one could say just as easily that had KFC provided the EPA with notice at the time it discovered thee contamination, the EPA would have brought suit against the Meghrigs and ordered them to clean-up. Finally, the majority's policy considerations do not apply at all to § 6973. While normally policy considerations need not support another statutory provision, in this case, in which the majority heavily relies on the Eighth Circuit's decision to allow the administrator to sue for reimbursement under § 6973, it seems that some of the majority's policy concerns should apply to § 6973 as well, especially since the Eighth Circuit simply assumes that reimbursement actions are permitted under § 6973.

In conclusion, I understand the majority's desire to hold contaminators accountable. In this case, however, in which KFC failed to bring suit before clean-up, RCRA does not offer them a remedy. It is unfortunate in a case such as this that neither CERCLA nor state statutory schemes provide relief for KFC because the substance found at the site was petroleum. But, this is an issue that Congress should address. Maybe restitutionary actions

under RCRA are necessary and practical, but it is not something that Congress has thus far enacted into legislation.

I would affirm the district court's dismissal of the amended complaint.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE CENTRAL
DISTRICT OF CALIFORNIA

Case No. 92-3269-HLH(Sx)
November 9, 1992

KFC WESTERN, INC.

v.

ALAN MEGHRIG and MARGARET MEGHRIG

ORDER DISMISSING ACTION

The motion to dismiss the First Amended Complaint (FAC) is granted without leave to amend. The action is dismissed by separate order signed and filed this date.

The complaint is a rewrite of the original complaint, with fancier labels attached. However, the substance is precisely the same. Plaintiff, a private (non-governmental) party sues for recovery of the costs expended for an environmental cleanup of contamination allegedly left on the property by defendant, a former owner. The cleanup is long since complete and allegedly cost plaintiff $211,000. Plaintiff places the label "response costs" on the amount sought and classifies the recovery sought as "equitable restitution".

The action is brought solely under the Resource Conservation and Recovery Act (RCRA), 42 USC 6901-6992(k). No other federal or state claims (common law or statutory) are invoked. The court concludes that limiting the claim to one under RCRA is deliberate.

The difficulty with plaintiff's claim under RCRA is dual.

The private suit must be brought under §6972(a)(1)(B), which is the authority claimed by plaintiff in its complaint. However, that section is limited (1) to injunctive relief and (2) to situations which "present an imminent and substantial endangerment to health or the environment". Thus, there is no provision for suits for damage after the cleanup is done and the danger is gone. There may be (there probably are) other bases for recovery, but it is not in RCRA. These conclusions are expressed in Walls 6Cir'85 761 F2d 311, 316 (no damages in a private suit under RCRA) and Commerce Holding Co. EDNY'90 749 FSupp 441, 445 (ditto; suit to recover remediation costs is a damage suit). These cases comport with the language of the statute, which provides for injunctive relief only for an existing imminent danger.

Plaintiff argues that recovery of the costs of digging up and disposing of the contaminated earth is "equitable restitution" and should be classified as an equitable remedy. This might be so if there was anything else equitable about the case, as to which the damages sought would be incidental, but there is not. This is a straight suit for damages incurred by plaintiff for violation of a duty allegedly imposed by law on defendant; merely placing the equitable label on the remedy sought does not change its character. Further, there is nothing now imminent about the danger. Plaintiff argues that suit can be brought if the danger was imminent before plaintiff expended the money to clean up the property, and cites Aceto 8Cir'89 872 F2d 1373 and Price 3Cir.'89 688 F2d 204. Each of these cases was decided under a different section (§6973), dealing with suits brought by the United States. Aceto was arguably an alternative holding but Price was only an off-the-cuff dictum. In Aceto, it was held irrelevant that the RCRA suit was not brought by the government before the cleanup in a situation in which CERCLA also applied. The language of §6973 (authorizing the government suit) bears certain similarities to the section in this case (authorizing a private suit), so the argument is not frivolous. However, the purposes of the two sections are entirely different. §6972(a)(1)(B) allows private plaintiffs to be "attorneys general" to force remedial measures for an imminent danger; thus the logic is that that section only applies to a suit for equitable relief. (See Commerce Holding, supra, at pg. 445; where the relief sought is to

benefit the plaintiff rather act for the public, the action is not within the scope of the purpose of §6972). So, here, even if some label could stick calling the relief sought "equitable" rather than one for damages, such relief is not within the purposes of the section. It can be readily argued that the same is not true of a suit by the United States under §6973. Whether all of this is true or not, the court does not consider Aceto controlling here, in dealing with a different section adopted for different purposes. The court cannot "buy" the heroic construction necessary to turn a section allowing injunctions to prevent imminent danger into a general damages statute.

Plaintiff has chosen to make or break this case on the single theory espoused. Since he cannot state a claim on that theory, the motion to dismiss is granted without leave and the action is dismissed.

This action is dismissed in its entirety with prejudice.

This is the final judgment for purposes of Fed.R.Civ.P. 54(a). It shall be entered pursuant to Fed.R.Civ.P. 58 and 79(a), and served upon the parties.

IT IS SO ORDERED.

Date: November 9, 1992

/s/ Harry L. Hupp
HARRY L. HUPP
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE CENTRAL
DISTRICT OF CALIFORNIA

Case No. 92-3269-HLH(Sx)
September 21, 1992

KFC WESTERN, INC.

v.

ALAN MEGHRIG and MARGARET MEGHRIG

ORDER

The motion to dismiss is granted with 10 days leave to amend.

Since § 6972(a)(1)(B) does not provide for a private damage suit (Walls 6Cir'85 761 F2d 311, 316; Commerce Holding Co. EDNY'90 749 FSupp 441, 445), and that is what this is, no claim is stated. Plaintiff says that it sues for restitution (an equitable remedy), but that approach is merely applying an inapplicable label to what is clearly a suit for damages. There is no money received by defendant from plaintiff that plaintiff wishes to have restored to it (i.e. "restitution"). Instead, plaintiff has allegedly suffered damage which it claims was caused by defendant. That, surely, involves a suit for money damages.

Defendant appears to be correct about one other thing also; that is, there is no "imminent" danger, a prerequisite of a private suit. Since the clean-up is done, there is no present danger at all. This, of course, goes to the same basic concept that the statute provides only for equitable relief, not for damages.

Since the section sued under requires 90 days notice, which is not alleged, there is an additional problem for plaintiff to solve.

Since the complaint is under subsection B, not subsection A as posited by defendant, there is no retroactivity problem. The statute is expressly retroactive. It just does not provide for a private damage suit.

APPENDIX D

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

April 14, 1995 Docket No. 92-56597

KFC WESTERN, INC.,
Plaintiff-Appellant,

v.

ALAN MEGHRIG and MARGARET MEGHRIG,
Defendants-Appellees.

ORDER

Before: BROWNING, PREGERSON, and BRUNETTI,
Circuit Judges.

Judges Browning and Pregerson vote to deny appellees' petition for rehearing. Judge Brunetti would grant the petition.

Judges Browning and Pregerson vote to reject the suggestion for rehearing en banc. Judge Brunetti would grant the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX E

UNITED STATES CODE, TITLE 42

§ 6972. Citizens' suits

(a) In general

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf-

(1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or

(B) against any person, including the United States, and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be

brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.

(b) Actions prohibited

(1) No action may be commenced under subsection (a)(1)(A) of this section-

(A) prior to 60 days after the plaintiff has given notice of the violation to-

(i) the Administrator;

(ii) the State in which the alleged violation occurs; and

(iii) to any alleged violator of such permit, standard, regulation, condition, requirement, prohibition, or order, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter; or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order.

In any action under subsection (a)(1)(A) of this section in a court of the United States, any person may intervene as a matter of right.

(2)(A) No action may be commenced under subsection (a)(1)(B) of this section prior to ninety days after the plaintiff has given notice of the endangerment to-

(i) the Administrator;

(ii) the State in which the alleged endangerment may occur;

(iii) any person alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in subsection (a)(1)(B) of this section, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter.

(B) No action may be commenced under subsection (a)(1)(B) of this section if the Administrator, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment-

(i) has commenced and is diligently prosecuting an action under section 6973 of this title or under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9606];

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604];

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604] and is diligently proceeding with a remedial action under that Act [42 U.S.C.A. § 9601 et seq.]; or

(iv) has obtained a court order (including a consent decree) or issued an administrative order under section 106 of the Comprehensive Environmental Response,

Compensation and Liability Act of 1980 [42 U.S.C.A. § 9606] or section 6973 of this title pursuant to which a responsible party is diligently conducting a removal action, Remedial Investigation and Feasibility Study (RIFS), or proceeding with a remedial action.

In the case of an administrative order referred to in clause (iv), actions under subsection (a)(1)(B) of this section are prohibited only as to the scope and duration of the administrative order referred to in clause (iv).

(C) No action may be commenced under subsection (a)(1)(B) of this section if the State, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment-

(i) has commenced and is diligently prosecuting an action under subsection (a)(1)(B) of this section;

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604]; or

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604] and is diligently proceeding with a remedial action under that Act [42 U.S.C.A. § 9601 et seq.].

(D) No action may be commenced under subsection (a)(1)(B) of this section by any person (other than a State or local government) with respect to the siting of a hazardous waste treatment, storage, or a disposal facility, nor to restrain or enjoin the issuance of a permit for such facility.

(E) In any action under subsection (a)(1)(B) of this section in a court of the United States, any person may intervene as a matter of right when the applicant claims an interest relating to the subject of the action and he is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to

protect that interest, unless the Administrator or the State shows that the applicant's interest is adequately represented by existing parties.

(F) Whenever any action is brought under subsection (a)(1)(B) of this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and with the Administrator.

(c) Notice

No action may be commenced under paragraph (a)(2) of this section prior to sixty days after the plaintiff has given notice to the Administrator that he will commence such action, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation. Any action respecting a violation under this chapter may be brought under this section only in the judicial district in which such alleged violation occurs.

(d) Intervention

In any action under this section the Administrator, if not a party, may intervene as a matter of right.

(e) Costs

The court, in issuing any final order in any action brought pursuant to this section or section 6976 of this title may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(f) Other rights preserved

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency).

(g) Transporters

A transporter shall not be deemed to have contributed or to be contributing to the handling, storage, treatment or disposal, referred to in subsection (a)(1)(B) of this section taking place after such solid waste or hazardous waste has left the possession or control of such transporter, if the transportation of such waste was under a sole contractual arrangement arising from a published tariff and acceptance for carriage by common carrier by rail and such transporter has exercised due care in the past or present handling, storage, treatment, transportation and disposal of such waste.

(2)

No. 95-83

Supreme Court, U.S.
FILED
AUG 16 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

ALAN MEGHRIG and MARGARET MEGHRIG,

Petitioners,

vs.

KFC WESTERN, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DANIEL ROMANO
Counsel of Record
LAW OFFICE OF
DANIEL ROMANO
Attorney for Respondent
100 Wilshire Building
Suite 1300
Santa Monica, California 90401
(310) 451-4959

7247
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

BEST AVAILABLE COPY

15 pp

LIST OF PARTIES

The parties to the proceedings are:

Petitioners:

Alan Meghrig, an individual, and Margaret Meghrig, an individual.

Respondent:

KFC Western, Inc., a corporation

TABLE OF CONTENTS

	Page
List of Parties	i
Table of Contents	ii
Table of Citations	iii
Statutes Involved	1
Statement of the Case	2
Reasons for Denying the Writ	3
I. The decision of the Ninth Circuit does not conflict with any decisions of other circuit courts or with any decisions of this Court.	3
II. This case is moot because, since the filing of the petition for certiorari, Respondent has become financially unable to pursue its claims against Petitioners and has offered to dismiss its action currently pending in the District Court pursuant to Fed. R. Civ. P. 41(a).	6
III. The petition for certiorari should be denied because the rulings for which review is sought do not concern issues of significant importance.	7
IV. The decision of the Ninth Circuit correctly interpreted the RCRA statute.	8
Conclusion	10

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Furrer v. Brown, No. 94-3281 EMSL (8th Cir., argued April 12, 1995)	4
Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 108 S. Ct. 376, 98 L. Ed. 2d 306 (1987)	5
Honig v. Doe, 484 U.S. 305, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)	6
Middlesex County Sewerage Authority v. National Sea Clammers Assn., 453 U.S. 1, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981)	5
SEC v. Medical Comm. for Human Rights, 404 U.S. 403, 92 S. Ct. 577, 30 L. Ed. 2d 560 (1972)	6
Steffel v. Thompson, 415 U.S. 452, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974)	6
United States v. Aceto Agr. Chemicals Corp., 872 F.2d 1373 (8th Cir. 1989)	4, 7, 8, 9
United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987)	8

Contents

	Page
United States v. Price, 688 F.2d 204	8
Statutes Cited:	
42 U.S.C. § 6972(a)(1)(B)	1, 4, 5, 7, 8
42 U.S.C. § 6973	8
42 U.S.C. § 7002	1, 2
42 U.S.C. § 7003(a)	4
United States Constitution Cited:	
Article III	6
Rules Cited:	
Federal Rule of Civil Procedure 41(a)	6
Supreme Court Rule 10	3, 5

STATUTES INVOLVED

Section 7002 of the Resource Conservation and Recovery Act

("RCRA") [42 U.S.C. § 6972(a)(1)(B)] which provides, in pertinent part:

> Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf —
>
> (1)(A)
>
> • • •
>
> (B) *against any person,* including the United States, and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage or disposal facility, *who has contributed* or who is contributing *to the past or present* handling, storage, treatment, transportation, or *disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment;*
>
> • • •
>
> *The district court shall have jurisdiction,* without regard to the amount in controversy

or the citizenship of the parties . . . *to restrain any person* who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste *referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both,* or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title. (Emphasis supplied.)

STATEMENT OF THE CASE

Respondent KFC Western, Inc. ("KFC") filed this action on May 29, 1992, seeking recovery of the cost of environmental remediation performed by KFC on its own property. Specifically, the complaint sought equitable restitution of such costs from Petitioners Alan and Margaret Meghrig, the property's prior owners and alleged polluters. The District Court did not reach the merits of Respondent's claims but instead, after two hearings, dismissed Respondent's complaint on the grounds that Section 7002 of RCRA did not afford retrospective restitutionary relief.

In December, 1992, Respondent appealed the District Court's judgment of dismissal to the Court of Appeals for the Ninth Circuit. The Court of Appeals reversed the District Court's order, holding that RCRA does authorize citizen suits for restitution of remediation costs if the pollution remediated had at some time in the past posed an "imminent and substantial endangerment" to health or the environment. The Court of Appeals rejected Petitioners' argument that the language of the statute requires that "imminent and substantial endangerment" must exist at the time that a RCRA citizen suit is filed.

After unsuccessfully seeking a rehearing before the court of Appeals, Petitioners filed petition for writ of certiorari with this Court.

REASONS FOR DENYING THE WRIT

Petitioners do not raise any actual conflict among the circuit Courts of Appeals nor with prior decisions of this Court. In addition, since the filing of the petition for certiorari, the petition has become moot because Respondent, for financial reasons, has become unable to pursue this action and has agreed to dismiss his complaint. And, finally, Petitioners have not raised any questions of significant importance that warrant review of the Ninth Circuit's opinion.

I.

THE DECISION OF THE NINTH CIRCUIT DOES NOT CONFLICT WITH ANY DECISIONS OF OTHER CIRCUIT COURTS OR WITH ANY DECISION OF THIS COURT.

Supreme Court Rule 10 states that this Court will grant a petition for writ of certiorari "only when there are compelling reasons therefor." Among the reasons enumerated by the rule as compelling is that a federal decision for which review is sought is "in conflict with the decision of another United States court of appeals." Petitioners have stopped short of claiming that an actual conflict between the circuits was created by the Ninth Circuit's decision in this case, while at the same time suggesting that such a conflict "will likely exist" in the future as a result of their own projections about the decision soon to be rendered in a case currently pending before the Eighth Circuit Court of Appeals. The hypothetical conflict confected by Petitioners is insufficient to satisfy the criteria of Rule 10.

The only reported decision of another federal Court of Appeals to consider the issue of whether a prerequisite to a RCRA cost recovery action is "imminent and substantial endangerment to health or the environment" *at the time that the cost recovery action is filed* is in complete accord with the decision of the Ninth Circuit in this case. This earlier decision, *United States v. Aceto Agr. Chemicals Corp.*, 872 F.2d 1373, 1382-83 (8th Cir. 1989), analyzing a governmental cost recovery action under an identically worded companion section of RCRA (42 U.S.C. § 7003(a)) holds that "imminent and substantial endangerment" need not be present at the time of the *filing* of the cost recovery action so long as such endangerment existed at the time that an environmental clean-up was performed on the contaminated property.

Because *Aceto* does not establish any conflict among the circuits, Petitioners have sought to conjure one up by suggesting that a more recent case currently pending before the Eighth Circuit, *Furrer v. Brown*, No. 94-3281 EMSL (8th Cir., argued April 12, 1995), will interpret § 6972(a)(1)(B) in a manner that will overturn its earlier ruling in *Aceto*. Petitioners' projections concerning the upcoming ruling in *Furrer* appear to be based wholly upon conversations outside the record between Petitioners' counsel and counsel for one of the parties in *Furrer* concerning remarks made by various members of the Eighth Circuit panel during oral argument. No evidentiary support in the form of affidavits or a transcript of the oral argument in question have been offered in support of the bald assertions of fact made in Petitioners' brief. It is obvious that Petitioners' contention that the upcoming decision in *Furrer* will "likely" create a conflict among the circuits is completely premature. Petitioners are anticipating a decision that is not only not published but, very possibly, not yet written. A non-existent ruling such as this one cannot and does not satisfy the requirement of Rule 10 that there be a genuine conflict between the opinions of at least two circuits in order for a petition for certiorari to be granted.

Petitioners' claims that the Ninth Circuit's decision in this case is in conflict with prior rulings of this Court is as specious as their claims that a conflict exists between the rulings of different circuits. In support of their contention Petitioners cite *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 108 S. Ct. 376, 98 L. Ed. 2d 306 (1987) and *Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981). Both of these authorities are completely inapposite. *Gwaltney* interprets a different citizen suit provision in the Clean Water Act and interprets it to mean that a citizen suit may not be brought against a defendant who violated a statutory obligation in the past, if the defendant is no longer purportedly "in violation". As the Ninth Circuit has concluded in its opinion in the instant action, § 6972(a)(1)(B) cannot be interpreted in this manner because it applies both prospectively and retrospectively to persons who contributed in the past to current endangerment. Similarly, *Sea Clammers* interprets the Federal Water Pollution Control Act and the Marine Protection, Research and Sanctuaries Act — not the RCRA statute — as not providing private rights of action for anything other than injunctive relief. In reaching that conclusion, this Court examined in detail the legislative history of both acts as well as the statutory language. The statutory language and legislative history of RCRA are entirely different from the two federal acts interpreted in *Sea Clammers*. Hence, the decision of the Ninth Circuit in this case does not conflict in any way with this Court's earlier rulings in *Gwaltney* and *Sea Clammers* and, therefore, granting the petition for certiorari on this ground would be wholly improvident and contrary to the criteria set forth in Rule 10.

II.

THIS CASE IS MOOT BECAUSE, SINCE THE FILING OF THE PETITION FOR CERTIORARI, RESPONDENT HAS BECOME FINANCIALLY UNABLE TO PURSUE ITS CLAIMS AGAINST PETITIONERS AND HAS OFFERED TO DISMISS ITS ACTION CURRENTLY PENDING IN THE DISTRICT COURT PURSUANT TO FED. R. CIV. P. 41(a).

Article III of the Constitution requires that each case filed in a federal court, in order to be justiciable, present an actual "controversy". The long established rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time that the complaint is filed. *Steffel v. Thompson,* 415 U.S. 452, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974); *SEC v. Medical Comm. for Human Rights,* 404 U.S. 403, 92 S. Ct. 577, 30 L. Ed. 2d 560 (1972).

A case may become moot and non-justiciable if the actual controversy dies at some point after a federal appellate court renders a ruling and while an appeal or petition for certiorari is pending before this Court. *Honig v. Doe,* 484 U.S. 305, 318, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988).

In this case, the actual federal controversy came to an end after Petitioners filed their petition for certiorari. After the petition was filed, Respondent became financially unable to bear the cost of continuing to litigate this action, and Respondent's counsel brought this fact to the attention of Petitioners and their counsel. In view of Respondent's inability to continue prosecuting his claims, Respondent has offered to dismiss its federal action pursuant to Fed. R. Civ. P. 41(a). Respondents have offered to agree to a dismissal with prejudice, which Respondent does not agree to, and will shortly file an appropriate motion to

dismiss in the District Court. Whatever the result of that motion, it appears clear that for purposes of this Court's review of the Ninth Circuit's panel opinion, the controversy over whether Respondent has the right to prosecute this action for equitable restitution against Petitioners has become entirely moot, and the petition for certiorari should be denied on grounds of lack of the requisite case or controversy.

III.

THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE THE RULINGS FOR WHICH REVIEW IS SOUGHT DO NOT CONCERN ISSUES OF SIGNIFICANT IMPORTANCE.

Petitioners primary argument is that the Ninth Circuit's opinion permitting citizen suits for equitable restitution under RCRA is significant because it creates a new statutory right of recovery for individuals that will give rise to a huge number of new cases. Not only is this contention unsupported by any empirical evidence that the dreaded avalanche of new cases has begun, but it is simply incorrect to claim, as Petitioners have done, that the Ninth Circuit's decision has made important new law. In fact, the important new law on this issue was made six years ago by the Eighth Circuit when it decided *United States v. Aceto Agr. Chem. Co., supra,* the first case to hold — interpreting a RCRA provision parallel to § 6972(a)(1)(B) that authorizes cost recovery actions by the government — that "imminent and substantial endangerment" need not exist at the time that an action for equitable restitution is filed so long as it existed at the time of the clean-up. It was the *Aceto* case, if any, that had the potential to open the floodgates of new litigation but did not do so. This case merely reiterates the principle first enunciated in *Aceto* and applies it to citizen suits, already clearly authorized by RCRA. In any event, the Ninth Circuit's decision is likely to

reduce federal court litigation by promoting settlement among parties who have contributed to environmental pollution.

IV.

THE DECISION OF THE NINTH CIRCUIT CORRECTLY INTERPRETED THE RCRA STATUTE.

Petitioners maintain that the Ninth Circuit erred in ruling that § 6972(a)(1)(B) of RCRA authorizes citizen suits for restitution. A close reading of the entire statute, as performed by the Ninth Circuit, reveals the incorrectness of Petitioners' position. In reaching its interpretation, the Ninth Circuit focused on a § 6973 provision worded almost identically to § 6972(a)(1)(B), which authorizes suits by the Administrator of the Environmental Protection Agency. The Ninth Circuit noted that this provision has been interpreted by several federal circuits to allow the government to seek restitutionary cost recovery (*United States v. Aceto Agric. Chem Corp., supra,* at 1383; *United States v. Northeastern Pharmaceutical & Chem Co.*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); *United States v. Price*, 688 F.2d 204, 214) and concluded, quite logically, that its companion provision, § 6972(a)(1)(B), should be interpreted similarly to permit citizen suits for restitution.

Petitioners' contention that no such private right of action exists and that authorizing such a right runs counter to the very purpose of the statute's citizen suit provisions was rejected by the Ninth Circuit as eviscerating RCRA's ability to provide meaningful relief to members of the public most seriously affected by the presence of pollution:

> It would be unfair and poor public policy to interpret § 6972(a)(1)(B) as barring restitution actions. By doing so, we would

> make the citizen suit remedy meaningless in most cases for the very citizens who most deserve the remedy, namely innocent citizens, like KFC, who have a financial stake in the contaminated property as well as potential and actual clean-up liability. As in this case, the government often orders innocent parties, so-called "responsible parties" under the statute, to remedy discovered contamination on their property even though they did not cause the contamination or have any ties to the property when the contamination occurred. When the government orders clean-up, the innocent citizen must respond expeditiously to the order. There is no time to sue for "other equitable relief" in the form of a mandatory clean-up injunction against past polluters who may or may not still be on the scene . . . [A]s the Third Circuit has recognized, public policy concerns might favor allowing a plaintiff to clean contaminated property first and seek reimbursement later. [citation.]

49 F.2d 523-524.

In addition, the Ninth Circuit opinion correctly relies on an analysis of the statutory language in light of the RCRA statute's purpose in rejecting Petitioners' arguments that the "endangerment to health or the environment" must have been imminent at the time that the action for restitution was commenced. The Ninth Circuit opinion adopted the Eighth Circuit's reasoning in *United States v. Aceto Agric. Chem. Corp., supra,* that the purpose of RCRA is "to give broad authority to the courts to grant all relief necessary to ensure complete protection

of the public health and the environment" and that the requirement that the endangerment be imminent as of the time that the restitution action was filed would both "defeat this purpose" and would be "absurd and unnecessary". In this regard, the reasoning of both the Third and the Ninth Circuits is highly persuasive and should be adopted by this Court.

CONCLUSION

For the reasons stated the Petitioners' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DANIEL ROMANO
Counsel of Record
LAW OFFICE OF
DANIEL ROMANO
Attorney for Respondent
100 Wilshire Boulevard
Suite 1300
Santa Monica, California 90401
(310) 451-4959

Supreme Court, U.S.
FILED
SEP 21 1995
CLERK

No. 95-83

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

ALAN MEGHRIG AND MARGARET MEGHRIG,
Petitioners,
vs.
KFC WESTERN, INC.,
Respondent.

On Petition for a Writ of Certiorari To the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JOHN P. ZAIMES
Counsel of Record
CLIFTON J. MCFARLAND
MCCLINTOCK, WESTON,
BENSHOOF, ROCHEFORT,
RUBALCAVA & MACCUISH
444 South Flower Street
Forty Third Floor
Los Angeles, California 90071
(213) 623-2322

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

33 pp

TABLE OF CONTENTS

	Page(s)
PRELIMINARY STATEMENT	1
A CONFLICT EXISTS BETWEEN THE EIGHTH AND NINTH CIRCUITS	2
THE UNDERLYING ACTION HAS NOT BEEN DISMISSED, AND THIS CASE IS NOT MOOT	4
CONCLUSION	7

TABLE OF AUTHORITIES

CASES

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 5

Cort v. Ash, 422 U.S. 66 (1975) 3

Furrer v. Brown, __ F.3d __ (Aug. 15,, 1995) 2

Deakins v. Monaghan, 484 U.S. 193 (1988) 7

Lau v. Glendora Unified School District,
792 F.2d 929 (9th Cir. 1986) 6

United States v. Aceto Agricultural Chemicals
Corp., 872 F.2d 1373 (8th Cir. 1989) 4

United States v. Munsingwear, Inc.,
340 U.S. 46 (1950) 7

United States v. Northeastern Pharmaceutical and
Chemical Co., 810 F.2d 726 (8th Cir. 1986),
cert. denied, 484 U.S. 848 (1987) 4

STATUTES

42 U.S.C. § 6972(e) 6

Federal Rules of Civil Procedure Rule 41(a) 6

MISCELLANEOUS

Wright & A. Miller, Federal Practice and Procedure
§ 2366 at 316 (1995) 6

No. 95-83

In the Supreme Court of the United States

OCTOBER TERM, 1995

Alan Meghrig and Margaret Meghrig,
Petitioners,

vs.

KFC Western, Inc.,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

PRELIMINARY STATEMENT

Much has happened since the filing of the Petition for Writ of Certiorari in this action. Most notably, the decision of the Eighth Circuit Court of Appeals in *Furrer v. Brown*, which Petitioners indicated was likely forthcoming, has now been rendered. The text of that opinion is reprinted in the appendix to this brief. App. at A-1 to A-22. As Petitioners

also indicated might happen, the Eighth Circuit reached a result directly contrary to that of the Ninth Circuit in this action. Moreover, as we develop in the following section, the Eighth Circuit had the Ninth Circuit's opinion available for consideration well before oral argument in *Furrer*, and its decision minced no words in rejecting the Ninth Circuit's opinion as one based on a "questionable proposition" and on erroneous interpretations of Eighth Circuit precedents.

The other significant event that has occurred since the filing of the Petition in July is that Respondent KFC Western has, after aggressively pursuing for nearly four years both a state court action and a federal court action against the Meghrigs, apparently with little or no factual support for its claims against them, has suddenly decided that it wishes to dismiss only its federal court action, thus creating, KFC hopes, a mootness issue in this case. As we discuss in the third section of this brief, no mootness issue has yet been created nor is one likely to be created during the pendency of this Petition or during consideration of the merits if certiorari is granted.

II.

A CONFLICT EXISTS BETWEEN THE EIGHTH AND NINTH CIRCUITS

In their opening brief, Petitioners informed this Court of a decision pending in the Eighth Circuit that could present a possible conflict in the circuit courts on the issues presented. A very real conflict in the circuits now exists following the decision of the Eighth Circuit Court of Appeals in *Furrer v. Brown*, __ F.3d __, No. 94-3281 (Aug. 15, 1995). App. at A-1 to A-22. Thus, one of the key considerations for granting a petition for writ of certiorari is now met in this action. Supreme Court Rule 10.1(a).

The Eighth Circuit's decision extensively analyzed

whether a private cost recovery action under RCRA could be read into in that statute under the implied right of action test enunciated in *Cort v. Ash*, 422 U.S. 66 (1975). Petitioners analyzed the *Cort v. Ash* factors in their opening brief, and we will not repeat that analysis here. Pet. at 26-28.

The Eighth Circuit's opinion is particularly significant because of its analysis of the Ninth Circuit's decision in the matter below, key portions of which turn on the Ninth's analysis of Eighth Circuit precedents. The Eighth Circuit unequivocally rejected the Ninth Circuit's analysis:

> "We think, however, that the [Ninth Circuit] began with a questionable proposition and then mistakenly reached its result in reliance on cases from this Circuit that, when carefully analyzed, do not support the *KFC Western* decision."
>
> *Furrer v. Brown*, App. at A-17.

The "questionable proposition" referred to by the Eighth Circuit was the Ninth Circuit's misinterpretation of a key portion of the legislative history of RCRA in support of its contention that Congress intended to give private citizens the right to recover money damages. *Id.*, App. at A-18 to A-19. The Eighth Circuit further opined that:

> "From an arguably faulty premise, then, the [Ninth Circuit] goes on to misconstrue two Eighth Circuit opinions involving governmental plaintiffs and to conclude that § 6972 authorizes the recovery of cleanup costs by private plaintiffs. *In the two cases from this circuit upon which the KFC Western court relies, the issue of whether cleanup costs may be recovered in a governmental action under*

§ 6973(a) was never before this Court.

> *Id.*, App. at A-19. (emphasis added).

The Eighth Circuit went on to explain how it never considered the issue of governmental entitlement to recovery of cleanup costs under § 6973(a) in those two decisions, *United States v. Northeastern Pharmaceutical and Chemical Co.*, 810 F.2d 726 (8th Cir. 1986), *cert. denied* 484 U.S. 848 (1987) ("*NEPACCO*") and *United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373 (8th Cir. 1989) ("*Aceto*"). It bears noting that both KFC Western and *amicus curiae* Kaufman and Broad also rely heavily on *NEPACCO* and *Aceto* in asserting that the Petition should be denied.

III.

THE UNDERLYING ACTION HAS NOT BEEN DISMISSED, AND THIS CASE IS NOT MOOT

The simple truth is that, as of the filing of this brief, no dismissal of the underlying action has occurred. While it is also true that a motion to dismiss has just recently been filed by Respondent,[1] many scenarios other than dismissal are likely with respect to the outcome of that motion. In short, the motion has not been granted, it may not be granted, and, even if it is granted, a case or controversy will almost certainly still exist in this action.

Petitioners are entitled to suspect Respondent's motivations in moving at this late date to dismiss the underlying action without prejudice. This is a case that plaintiff has prosecuted vigorously for nearly four years, even

---

[1] The scheduled hearing date for the motion is October 16, 1995.

when faced with overwhelming evidence of a weak position. Plaintiff's action to recover money damages was originally commenced in state court. All of its eleven causes of action were twice dismissed in that court based on either statutes of limitations or failure to state a claim. Plaintiff appealed the dismissal of three of those causes of action to the California court of appeal. The California appellate court upheld the trial court in all major respects, only allowing plaintiff to return to the trial court to attempt to plead limited causes of action for continuing nuisance and continuing trespass. Not long after plaintiff re-pled those causes of action, they, too, were eliminated following a motion for summary judgment by defendants. It is significant that the basis upon which defendants' motion was granted was that there was no evidence to show that the defendant Meghrigs had engaged in any acts on the property which caused the subject contamination, or that they even owned the property at the time such acts occurred. *Cf. Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

In its federal court RCRA action seeking the same recovery on the same facts, KFC has unsuccessfully opposed two motions to dismiss in the federal district court, has pursued a full appeal of the dismissal, and has vigorously opposed this Petition, all at a time when KFC apparently possessed no evidence that the Meghrigs committed any of the acts necessary to show liability. Nonetheless, plaintiff now contends that it suddenly "became financially unable to bear the cost to litigate this action" (Opp. Br. at 6.) after the Writ Petition was filed, although it is apparently ready, willing and able to bear the costs of pursuing a second appeal to the California court of appeal in the state action, which appeal has already been noticed. The stated reason for the requested dismissal does not ring true, and it may very well be that the trial court will refuse to dismiss the action at this time on that ground alone. We respectfully suggest that this Court should also look with considerable skepticism on KFC's sudden attempt to moot the pending petition based on

these facts.

In addition, Federal Rules of Civil Procedure Rule 41(a), provides that dismissal may be made "upon such terms and conditions as the Court deems proper." Given the history and facts of this case, as summarized above, it would seem entirely likely that one of the terms and conditions of dismissal will be a substantial attorneys fees award to Petitioners in this case, particularly since the RCRA statute authorizes an award of attorneys fees to a prevailing party. 42 U.S.C. § 6972(e). KFC has stated in its motion to dismiss that:

> "If the district court conditions an order dismissing plaintiff's action upon the payment of any attorney's fees to defendants, plaintiff will not dismiss its action." Motion at 10 n.4.[2]

And should the district court deny Petitioners' request for attorney's fees, Petitioners will in all likelihood appeal that denial. In either instance, a case or controversy will continue to exist.

It also bears noting that the unsuccessful plaintiffs in *Furrer v. Brown* have filed a Petition for Rehearing in the Eighth Circuit Court of Appeal. Counsel for one of the defendants in that case relates that the Furrers have indicated that they intend to pursue a Petition for Writ of Certiorari if their rehearing petition is denied. Thus, the issues in this Petition may come before this Court in the form of the Furrers' petition in any event.

---

[2] Such a withdrawal is entirely permissible. 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2366 at 316 (1995); *Lau v. Glendora Unified School District*, 792 F.2d 929 (9th Cir. 1986).

Finally, we note that, while this case is certainly not now moot and may never be moot based on plaintiffs' motion to dismiss below, should mootness be created at any time in this action, the decision of the Ninth Circuit should be vacated, and the district court should be ordered to dismiss KFC's complaint with prejudice in order to prevent any subsequent reinstitution of the RCRA claim by KFC. *Deakins v. Monaghan*, 484 U.S. 193 (1988) *United States v. Munsingwear, Inc.*, 340 U.S. 46 (1950).

IV.

CONCLUSION

There is now, a sharp unmistakable conflict in the circuits concerning the issues framed by the Petition for Writ of Certiorari. As Petitioners noted in their opening brief, these issues have wide ranging ramifications in the very active arena of environmental litigation. Petitioners respectfully request that the Supreme Court grant their Petition.

Dated: September 20, 1995.

Respectfully submitted,

John P. Zaimes
Counsel of Record

Clifton J. McFarland
McCLINTOCK, WESTON,
BENSHOOF, ROCHEFORT,
RUBALCAVA & MacCUISH
444 South Flower Street
Forty Third Floor
Los Angeles, California 90071
(213) 623-2322
Counsel for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Argued: April 12, 1995
Decided: August 15, 1995
Docket No. 94-3281

J. Richard Furrer; Margaret L. Furrer,
Plaintiffs-Appellants,

v.

Donald F. Brown; Dorothy J. Brown;
Louis W. Fagas; Geraldine J. Fagas;
Shell Oil Company,
Defendants-Appellees.

Before FAGG and BOWMAN, Circuit Judges,
and BENNETT, District Judge.

BOWMAN, Circuit Judge.

J. Richard Furrer and Margaret L. Furrer appeal from an order of the District Court[1] granting the separate motions to dismiss filed by Donald F. Brown, Dorothy J. Brown, Louis W. Fagas, and Geraldine Fagas, and by Shell Oil Company, on the Furrers' claim brought under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6987 (1988 & Supp. V 1993), to recover costs incurred in cleaning up soil contamination caused by leaking underground gasoline storage tanks located at the property

---

[1] The Honorable Carol E. Jackson, United States District Judge for the Eastern District of Missouri.

known as 4701 Gravois Avenue, St. Louis, Missouri. We affirm.

I.

The Furrers own the Gravois Avenue property. The Browns and Fagases were owners of the site at times before the Furrers acquired the property, and Shell Oil Company at one time was lessee of the property and operated a service station there. The Furrers became aware in 1991 that the property was contaminated by petroleum, and they "were ordered to remediate the contamination by the Missouri Department of Natural Resources" (MoDNR). Complaint at ¶ 16, *Furrer v. Brown*, No. 4:93-CV-2276 (E.D. Mo. filed Oct. 22, 1993).

The Furrers sought to recover their remediation costs from the Browns, the Fagases, and Shell Oil, appellees here, alleging federal jurisdiction pursuant to 42 U.S.C. § 6972 (1988). Besides a RCRA count, the Furrers asserted three state common law theories of recovery. The District Court granted the appellees' motions to dismiss, holding that the court did not have subject matter jurisdiction over the federal claim, and declining to exercise supplemental jurisdiction over the state law claims. The Furrers appeal. Because the dismissal for lack of subject matter jurisdiction was granted without reference to matters outside the pleadings, the appeal presents a question of law that we review *de novo*.[2] *See Christopher Lake Dev. Co. v. St. Louis County*, 35 F.3d 1269, 1273 (8th Cir. 1994).

---

[2] We ordered taken with the case, and now grant, appellees' motions to strike the Furrers' "Supplemental Appendix," which was filed appended to their reply brief.

II.

The statute under which the Furrers invoked federal court jurisdiction is RCRA's citizen suit provision, and reads in pertinent part as follows:

> Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf--
>
> . . .
>
> (B) against any person . . . including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment;
>
> . . . .
>
> . . . The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce [permits and other such requirements], to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste . . ., **to order such person to take such other action as may be necessary,** or both
>
> . . . .

42 U.S.C. § 6972(a)(1)(B) (1988) (emphasis added).

Section 6972 gives the federal courts subject matter jurisdiction to hear citizen suits where specific equitable remedies are sought: prohibitory or mandatory injunctive relief "to enforce," "to restrain," and "to order . . . other action . . . necessary." The statute does not give the district courts express authority in citizen suits to award money judgments for costs incurred in cleaning up contaminated sites. Thus, if such a remedy is to be available, we must find either that Congress, by authorizing the district court "to order . . . such other action as may be necessary," id., implicitly created such a remedy, or that the "cause of action . . . may have become a part of the federal common law through the exercise of judicial power to fashion appropriate remedies for unlawful conduct." *Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO*, 451 U.S. 77, 90 (1981). Federal common law is not an issue in this case,[3] and as explained in the discussion that follows we reject § 6972 as a source of federal jurisdiction for the Furrers' cause of action.

When considering the possibility that it was Congress's intent to authorize a monetary remedy for private citizens when it enacted § 6972, or, more precisely, when it

---

[3] In what was evidently intended as a preemptive strike, Shell raises in its brief to this Court (and then proceeds to argue against) the possibility that federal common law is an issue in this case. Shell contends that, because there is no statutory cause of action, federal common law is the only possible source of federal jurisdiction, but then argues there is no authority for a federal common law cause of action. In reply the Furrers, insisting that the remedy they seek is statutory, apparently agree with Shell: "There is no issue of general common law jurisdiction presented by" § 6972. Reply Brief of Appellants at 9. The Furrers have pinned their hopes on the statute, and they do not assert any theory of recovery based on federal common law, so we need not and do not discuss that source of authority.

amended the statute in 1984,[4] we are guided by the teachings of the Supreme Court. The "familiar test" of *Cort v. Ash*, 422 U.S. 66 (1975), which places "the burden . . . on [the Furrers] to demonstrate that Congress intended to make a private remedy available" such as the one the Furrers seek,[5] *Suter v. Artist M.*, 503 U.S. 347, 363 (1992), sets out four factors relevant to the search for an implied cause of action. First, we look at the statute to determine if the Furrers are in the class for whose benefit the statute was enacted, and then at the legislative history to see if it explicitly or implicitly shows an intent to create or deny the cause of action. *Cort*, 422 U.S. at 78. Third, we examine the proposed remedy in the context of the purpose of the statutory scheme, and finally we consider whether the cause of action is one traditionally a matter of state law, so that inferring a federal remedy would be inappropriate. *Id.*

---

[4] In 1984 Congress changed the language detailing the relief that the district court was empowered to grant from "to enforce such regulation or order, or to order the Administrator to perform such act or duty as the case may be," 42 U.S.C. § 6972(a) (1982), to the present language, quoted above. Clearly the 1984 amendment expanded the available remedies; the question is the degree to which it did so.

[5] The Furrers' brief demonstrates their fundamental misunderstanding of this analysis. They contend that the lack of a federal common law issue in this case, *see supra* note 3, obviates the need for a review of the factors from *Cort v. Ash*, 422 U.S. 66 (1975). Somehow they understand the *Cort* analysis--despite its emphasis on discerning what Congress intended when enacting a statute--to be a search for a cause of action in the federal common law. The *Cort* decision, however, examined a federal statute for an implied cause of action--which is what the Furrers are asking us to find here. Although federal common law theories of recovery are not relevant to this case, the *Cort* factors are.

A.

As discussed above, § 6972 on its face does not provide for the recovery of remediation costs by way of a citizen suit.[6] Nevertheless, Congress's failure to include express authority for the district court to award monetary relief, "although significant, is not dispositive if, among other things, the language of the statutes indicates that they were enacted for the special benefit of a class of which [the plaintiff] is a member." *Northwest Airlines*, 451 U.S. at 91-92 (footnote omitted). Clearly, the Furrers as "citizens" are among the "any persons" who are authorized to bring suit for enforcement of RCRA's permits and regulations. The "benefit" of RCRA, however, inures to all citizens of the United States, and § 6972 confers upon each of those beneficiaries the right to bring suit in the federal courts to compel enforcement of RCRA's provisions. Neither RCRA generally nor § 6972 specifically was enacted for the "special benefit" of those owners of property who pay to remediate soil contamination that has resulted from leaking underground gasoline storage tanks and for which they claim no responsibility. In fact, a persuasive argument can be made

---

[6] We resolve this appeal on the question of whether the cause of action for recovery of cleanup costs is available under § 6972(a)(1)(B) and pretermit other issues raised by the parties. The District Court concluded, and the appellees urge, that the Furrers did not allege the required "imminent and substantial endangerment to health or the environment" required by § 6972, since the site already has been cleaned up. We do not decide that issue. In its appellee's brief, Shell argues that petroleum leaks from underground storage tanks are not hazardous wastes within the meaning of § 6972; the United States as *amicus curiae* takes the opposite position. It is also unnecessary for us to resolve this question. Other *amici*, the State of Missouri and the Bi-State Development Agency of the Missouri-Illinois Metropolitan District, in their briefs take the Furrers' position on the issue on which we do resolve the case.

that the Furrers are in a class of persons that RCRA and § 6972 are directed **against**--the owners of a storage facility where hazardous waste has presented an imminent and substantial endangerment. *See id.* at 92 (declining to infer cause of action for employer to seek contribution from union under the Equal Pay Act and Title VII where "both statutes are expressly directed against employers"). We conclude that the language of § 6972--benefiting the citizenry of the United States generally and endowing the federal courts with subject matter jurisdiction for a suit brought by "any person"--demonstrates that it was not enacted for the "special benefit" of those in the Furrers' circumstances.

The Furrers argue that Congress, by giving the federal courts seemingly broad jurisdiction "to order [parties who have contributed to the contamination] to take such other action as may be necessary," intended a person who has incurred remediation costs to have a cause of action under § 6972 to recover those costs from the responsible parties. The Furrers characterize this recovery as "equitable restitution" and ask that we find it to be a remedy within the scope of the statute.

We think the Furrers read too much into the phrase "to take such other action as may be necessary." Giving the language a natural, unstrained reading, it appears to authorize federal courts to grant mandatory injunctive relief, that is, to order the responsible party to take action: to investigate a site, to remediate a site, and so forth. We do not think that "such other action as may be necessary" contemplates the payment of money to a party who already has cleaned up a contaminated site. Similarly, jurisdiction "to enforce" or "to restrain" does not encompass the authority to award monetary relief. "[W]hen legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." *Universities Research Ass'n, Inc. v. Coutu*, 450 U.S. 754, 773 n.24 (1981) (quoting *National R.R. Passenger Corp. v. National Ass'n of*

R.R. Passengers, 414 U.S. 453, 458 (1974)); accord *Transamerica Mortgage Advisors. Inc. v. Lewis*, 444 U.S. 11, 19 (1979) ("Yet it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.").

As the Supreme Court repeatedly has said, we are to begin with "the statutory language, particularly . . . the provisions made therein for enforcement and relief" when determining "whether Congress intended to create a private right of action under a federal statute without saying so explicitly." *Middlesex County Sewerage Auth. v. National' Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981); *see also Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979), and cases cited therein. The Furrers argue that the authority "to order . . . such other action" must include the full range of equitable remedies, including the restitution they claim. Assuming without deciding that it is equitable restitution that the Furrers seek (it looks to us suspiciously like money damages), we think that even a cursory look at federal environmental legislation demonstrates that "Congress knows how to define a right to contribution" in this area of the law. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 n.11 (1981). The examples that follow support our conclusion that Congress could have written § 6972 to include the remedy the Furrers seek, having clearly provided for it elsewhere in federal environmental law, and deliberately did not do so in this instance.

Congress demonstrated its faculty for writing a statute to include a cause of action for recovery of cleanup costs when it drafted RCRA. Within that legislation, Congress provided that the administrator of the Environmental Protection Agency (EPA) or a state could recover from the owner or operator of an underground storage tank the costs incurred "for undertaking corrective action or enforcement action with respect to the release of petroleum from" such a

tank. 42 U.S.C. § 6991b(h)(6)(A) (1988). Notably, Congress authorized no such recovery for present owners and operators against previous owners and operators who are responsible for petroleum leaks from underground storage tanks.[7]

Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993), a later-enacted major federal environmental act, Congress provided that "[a]ny person may seek contribution from any other person who is liable or potentially liable" for response costs. 42 U.S.C. § 9613(f)(1) (1988). This cause of action for contribution is in addition to CERCLA's citizen suit statute, which, much like the RCRA citizen suit statute, provides that any person may bring a civil action in federal court and gives the district court authority to enforce CERCLA regulations and "to order such action as may be necessary to correct the violation" of a CERCLA standard or requirement. *Id.* § 9659(c) (1988). Congress, knowing its CERCLA citizen suit provision did not extend the available remedies to include a cause of action for monetary recovery from other responsible parties, despite the broad "other action" language (which is also found in the RCRA citizen suit provision), and wishing to allow such a remedy in certain cases, enacted § 9613(f)(1) to provide expressly for contribution.[8]

---

[7] We do not intend by this discussion to imply any views on the question whether petroleum leaking from underground storage tanks is hazardous waste within the meaning of § 6972. *See supra* note 6.

[8] Presumably the Furrers did not bring this suit for contribution under CERCLA because CERCLA's definition of "hazardous substance" excludes "petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance." 42 U.S.C. § 9601(14) (1988).

Section 6972 is specific about the relief available under the statute. By its language, the statute authorizes injunctive relief, whether prohibitory (to stop generating hazardous waste) or mandatory (to comply with permits or regulations or to clean up hazardous waste). In other federal environmental legislation, Congress authorized suit for similar injunctive relief, but then specifically gave federal courts authority to hear claims for monetary recovery as well. "The comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional remedies." *Northwest Airlines*, 451 U.S. at 93-94.

B.

Although we are tempted to regard our discussion under Part IIA, *supra*, as dispositive of this case, fidelity to *Cort* requires that we next look at the legislative history of the 1984 amendment to § 6972 (clarifying the remedies available in citizen suits, *see supra* note 4) to see if we can discern any congressional intent regarding the remedy the Furrers seek. "Even settled rules of statutory construction could yield, of course, to persuasive evidence of a contrary legislative intent." *Transamerica Mortgage Advisors*, 444 U.S. at 20. But as is to be expected, because the statute did not "expressly create or deny" the remedy the Furrers seek, the legislative history is "equally silent or ambiguous on the question." *Northwest Airlines*, 451 U.S. at 94 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979)). While there is no indication in the legislative history that Congress intended to deny the recovery of cleanup costs under § 6972, by the same token there is no evidence that Congress intended to create such a remedy, and "implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best." *Touche Ross*, 442 U.S. at 571.

C.

Finding no congressional intent to create a private cause of action for the recovery of cleanup costs manifest in either § 6972 or its legislative history, we might, and probably should, end the inquiry here. *See California v. Sierra Club*, 451 U.S. 287, 298 (1981) (noting that the last two *Cort* factors "are only of relevance if the first two factors give indication of congressional intent to create the remedy"). But out of an abundance of caution we nevertheless have considered the third factor, the underlying purpose of the statute and the structure of the federal environmental statutory scheme, and we conclude that the remedy sought is not "necessary to make effective the congressional purpose" of § 6972. *Cort*, 422 U.S. at 84 (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964))

RCRA itself states that the objectives of the Act "are to promote the protection of health and the environment and to conserve valuable material and energy resources," and then sets forth eleven routes to that goal, none of which relate specifically to the citizen suit provision. 42 U.S.C. § 6902(a) (1988). The "national policy" statement accompanying the Act addresses only the reduction or elimination of "the generation of hazardous waste . . . as expeditiously as possible," and the appropriate treatment, storage, or disposal of "[w]aste that is nevertheless generated," but does not speak specifically to already contaminated property or its remediation. *Id.* § 6902(b). The citizen suit provision itself "permits individuals to commence an action in district court **to enforce waste disposal regulations** promulgated under" RCRA. *Hallstrom v. Tillamook County*, 493 U.S. 20, 22 (1989) (emphasis added). The overriding purpose of RCRA is clear: to prevent generation of hazardous waste in the first place, and to dispose of and treat properly that which is produced. In other words, RCRA's goal is to prevent the creation of hazardous

waste sites, rather than to promote the cleanup of existing sites.

Looking at § 6972, we see that, notwithstanding the inclusion of this citizen suit provision in RCRA, the statute has provisions whose obvious goal it is to forestall citizen suits so that they become available only as a last resort. The § 6972 plaintiff must give sixty days notice to the EPA, the state, and the alleged violator before bringing suit. 42 U.S.C. § 6972(b)(1)(A) (1988). The purpose of the notice requirement is to "allow[] Government agencies to take responsibility for enforcing environmental regulations, thus obviating the need for citizen suits," and to give the reputed violator the opportunity to correct his behavior so that it conforms with RCRA. *Hallstrom*, 493 U.S. at 29. Citizen suits are further discouraged by the very statute that authorizes them, because a person may not commence a § 6972 suit if the EPA or the state has initiated and is "diligently prosecuting" an enforcement suit (although a citizen may intervene in such a suit in federal court). 42 U.S.C. § 6972(b)(1)(B) (1988). It is apparent that, while Congress intended to allow citizen suits in order to foster compliance with RCRA's regulations, it wrote § 6972 to discourage citizen suits when compliance is at hand.

The legislative history of the 1984 amendment to § 6972 supports our conclusion that Congress intended the section to further the enforcement of RCRA regulations, that is, the regulation of hazardous waste, and did not intend to give citizens a cause of action for recovery of costs incurred for the cleanup of hazardous waste sites when regulation has failed. "[T]he legislative history indicates an intent to strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits." *Hallstrom*, 493 U.S. at 29.

According to the House Report, the 1984 amendment "confers on citizens a **limited right** under [§ 6972] to sue **to abate** an imminent and substantial endangerment." H.R. Rep. No. 198, 98th Cong., 2d Sess., pt. 1, at 53 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612 (emphasis added). This language makes it clear that we should not be inclined to add to the list of remedies found in the statute.[9] A cause of action "to abate" is a suit for an injunction--whether prohibitory to stop the generation of hazardous waste or mandatory to compel compliance with RCRA regulations. There is no indication that § 6972 as amended was intended to expand citizens' remedies to include the recovery of cleanup costs.

The comprehensive structure of federal environmental legislation in general, as discussed supra, at 7-8, also cautions against inferring a monetary remedy under § 6972. Numerous statutes that specifically authorize actions with such a remedy are already in place, further evidencing that the purpose of § 6972 was something else altogether.

The Furrers contend that allowing a cause of action to recover cleanup costs from those who have contributed or are contributing to contamination effectuates the purpose of RCRA and is an appropriate remedy within the rubric of § 6972's "other action . . . necessary." As the argument goes, citizens like the Furrers will be encouraged to abate contamination voluntarily, because they then can sue under § 6972 to recover remediation costs for which they are not equitably responsible.

---

[9] The minority views on the bill reflect a similar understanding of a RCRA citizen suit: that it is "intended to be an emergency type action to abate imminent hazards." H.R. Rep. No. 198, 98th Cong., 2d Sess., pt. 1, at 119 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5635.

We cannot deny that the Furrers' argument has a considerable surface appeal. We are mindful, however, that abatement of a hazardous waste spill can be ordered in diverse circumstances by a variety of federal and state authorities, and that liability for the remediation of contaminated property attaches, without regard to fault, to the then owner of the property. Thus, regardless of their ability to bring suit to recover costs expended in remediating a contaminated site, owners will clean up the waste--or they will be sued and forced to do so--and the goal of abatement will be served. The Furrers have alleged that they cleaned up the Gravois Avenue property because they were ordered to do so by the MoDNR, not because they knew they could recover their costs from the appellees. In the circumstances, we think it disingenuous of the Furrers to suggest that the remediation of the Gravois Avenue site might have been motivated by a federal remedy to recover cleanup costs, especially given the doubtful availability of that remedy. And as a general proposition we believe that it is the threat of criminal or civil sanctions that hasten a cleanup such as the one undertaken by the Furrers, not a belief that, under RCRA, remediation costs can be recovered from previous owners or users of the property.

In conclusion, we cannot say that the purposes of environmental law and of § 6972 would be served by providing for a monetary remedy in a citizen suit under § 6972. Thus the third *Cort* factor provides no assistance to the Furrers.

D.

We come now to the fourth Cort factor, which focuses on the relationship between federal law and state law and asks whether "the cause of action [is] one traditionally relegated to state law, in an area basically the concern of the States." *Cort*, 422 U.S. at 78. If so, it would be inappropriate to find an implied federal cause of action. Having concluded, based

on our analysis of the first three *Cort* factors, "ones traditionally relied upon in determining legislative intent," *Touche Ross*, 442 U.S. at 576, that Congress did not intend to incorporate within § 6972 an implied remedy for the recovery of cleanup costs, the fourth factor in the inquiry would seem to hold little, if any, significance. *See id.* at 575; *California v. Sierra Club*, 451 U.S. at 298 (stating that the last two *Cort* factors are irrelevant unless "the first two factors give indication of congressional intent to create the remedy"). Even so, we have considered this final Cort factor and have concluded, notwithstanding that the general subject matter of § 6972 may not be an area primarily of state concern, that this factor, like the others, affords no basis for finding in § 6972 an implied cause of action for the recovery of cleanup costs.

Section 6972 has a savings clause, which preserves a person's rights "under any statute or common law . . . to seek any other relief." 42 U.S.C. § 6972(f) (1988). The legislative history of the 1984 amendment to § 6972 reflects a debate in the House about the extent to which federal courts should assume jurisdiction over preserved supplemental state law claims. The majority committee report evidences an expectation that, the savings clause notwithstanding, courts will "exercise their discretion concerning pendent jurisdiction in a way that will not frustrate or delay the primary goal of this provision, namely the prompt abatement of imminent and substantial endangerments." H.R. Rep. No. 198, 98th Cong., 2d Sess., pt. 1, at 53 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612. The committee minority wished to strip federal courts of jurisdiction to hear any supplemental state law claims brought with RCRA citizen suits. The minority was concerned that allowing adjudication of state claims with § 6972 suits would unduly burden the federal courts and slow down the primary goal of the statute: the abatement of imminent hazards. "Instead of ending the imminent hazard, federal judges will be trying to decide cumbersome questions of state law nuisance, trespass, and personal and property

damage compensation." *Id.* at 119, *reprinted in* 1984 U.S.C.C.A.N. at 5635. Clearly all committee members had concerns (although to different degrees) about federal courts losing focus and concentrating on peripheral issues related to state claims--such as apportioning fault so as to award contribution--instead of acting quickly to abate imminent hazards. Given the specific reservation of state remedies in § 6972(f), and given congressional concern that citizen suits not become bogged down in the quest for private state law remedies (such as the recovery of cleanup costs), we think that this is at best a neutral factor and does nothing to advance the case for finding an implied federal cause of action for the recovery of cleanup costs.

E.

In sum, none of the four *Cort* factors tips the scales in favor of implying in § 6972 a cause of action to recover cleanup costs. In any event, as we intimated above, the *Cort* analysis no longer involves a balancing of the four factors; they now serve only as "guides to discerning" congressional intent.[10] *Thompson v. Thompson*, 484 U.S. 174, 179 (1988). "The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action." *Touche Ross*, 442 U.S. at 575. In none of the factors do we find a basis for imputing to Congress the intent to create in § 6972 an implied private cause of action for the recovery of cleanup costs.

---

[10] Justices O'Connor and Scalia would require "an actual congressional intent to create a private right of action," and believe the *Cort* analysis has been "effectively overruled" by subsequent Supreme Court opinions. *Thompson v. Thompson*, 484 U.S. 174, 188 (1988) (Scalia, J., concurring); *see also Roberts v. Wamser*, 883 F.2d 617, 623 n.17 (8th Cir. 1989) (questioning "the continued validity of the *Cort* analysis for determining the existence of private rights of action").

III.

The Furrers commend to us the Ninth Circuit's opinion in *KFC Western, Inc. v. Meghrig*, 49 F.3d 518 (9th Cir. 1995), *petition for cert.* filed (July 13, 1995) (No. 95-83), and urge that we follow the reasoning of the majority in that case. In a split decision, the court held that § 6972(a)(1)(B) gives the district court jurisdiction over private actions for the recovery of cleanup costs. We think, however, that the court began with a questionable proposition and then mistakenly reached its result in reliance on cases from this Circuit that, when carefully analyzed, do not support the *KFC Western* decision.

In § 6973, entitled "Imminent hazard," Congress has given the EPA administrator this authority:

> Notwithstanding any other provision of this chapter, upon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court against any person . . . who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal to restrain such person from such handling, storage, treatment, transportation or disposal, to order such person to take such other action as may be necessary, or both.

42 U.S.C. § 6973(a) (1988). The *KFC Western* court summarily states that, "[b]ecause Congress intended that citizen suits be governed by the same standards of liability as

governmental actions, and because it worded the provisions almost identically, we choose to interpret similarly the relief available under the two provisions." *KFC Western*, 49 F.3d at 521-22 (footnote omitted). The only support cited for the first part of that proposition is legislative history that, according to the court, "suggests" that suits under the citizen suit provision and the similar EPA suit provision were intended to parallel one another. According to the court, "[n]othing indicates that Congress intended citizen suits to serve a purpose different from that served by governmental actions." *Id.* at 521 n.3. But it is a ***non sequitur*** that the remedies available to the respective plaintiffs must be the same.

The language in the legislative history upon which the Ninth Circuit (and the Furrers) rely is this: "[The 1984 amendment to § 6972] confers on citizens a limited right under [§ 6972] to sue to abate an imminent and substantial endangerment pursuant to the standards of liability established under [§ 6973]." H.R. Rep. No. 198, 98th Cong., 2d Sess., pt. 1, at 53 (1984), *reprinted in*, 1984 U.S.C.C.A.N. 5576, 5612. First of all, this language indicates that the right to sue is conferred on private citizens pursuant to the standards of **liability** developed under § 6973; it does not say private citizens are entitled to the same **remedies** that are available to the EPA under § 6973. In addition, it is the right to sue "to abate"--a "limited right" at that--that is conferred pursuant to the standards of liability under § 6972, not any right to recover abatement costs. Even the *KFC Western* majority recognizes that "the legislative history cuts both ways," *KFC Western*, 49 F.3d at 521 n.3, but the court nevertheless relies on it to read §§ 6972 and 6973 as granting authority to award identical remedies to private plaintiffs and to governmental plaintiffs. From an arguably faulty premise, then, the court goes on to misconstrue two Eighth Circuit opinions involving governmental plaintiffs and to conclude that § 6972 authorizes the recovery of cleanup costs by private plaintiffs.

In the two cases from this Circuit upon which the *KFC Western* court relies, the issue of whether cleanup costs may be recovered in a governmental action under § 6973(a) was never before this Court.

In *United States v. Northeastern Pharmaceutical & Chemical Co.* (*NEPACCO*), 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987), the United States in a cross-appeal challenged the district court's refusal to award "response costs" under § 6973(a), a decision made because the court believed the statute required a showing of negligence and the government had made none. The Eighth Circuit reversed that holding on the negligence issue, but never made a finding that the recovery of response costs was available to the government under § 6973 in the first instance, apparently because the jurisdiction of the district court to award the recovery of such costs under RCRA was unchallenged. The issue may have been overlooked because many of the costs sought by the government were explicitly recoverable as response costs under CERCLA.

In *United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373 (8th Cir. 1989), the RCRA claim for "response costs" had been dismissed by the district court on the basis of its conclusions concerning the "imminent and substantial endangerment" and the "contributed to" language found in § 6973(a). The Eighth Circuit reversed and remanded for further proceedings, but again never addressed whether the remedy sought was authorized by § 6973.

Thus in both *NEPACCO* and *Aceto*, because the defendants did not raise the issue of subject matter jurisdiction and neither the district courts nor this Court addressed it *sua sponte*, the decisions reflect no consideration of the jurisdictional issue; instead, they simply assume subject matter jurisdiction *sub silentio* and deal with the merits of the

EPA's claims to recover cleanup costs. Now that the jurisdictional question is squarely before us, the opinions in *NEPACCO* and *Aceto* are not *stare decisis* on the issue, because the panels in those cases simply assumed, without deciding, that the federal courts are empowered by § 6973 to award the EPA the recovery of cleanup costs. Moreover, except for the *KFC Western* case, the Furrers have identified for us, and we have found, no cases specifically addressing the availability of a monetary remedy in § 6972 citizen suits since the 1984 amendment (or before 1984 for that matter) that have concluded that § 6972 provides such a remedy. There are several cases from federal district courts, however, that have decided as we do today. *See, e.g., Portsmouth Redev. & Housing Auth. v. BMI Apartments Assocs.*, 847 F. Supp. 380, 385 (E.D. Va. 1994); *Triffler v. Hopf*, No. 92 C 7193, 1994 WL 643237, at *5 (N.D. I11. Nov. 4, 1994); *Gache v. Town of Harrison, N.Y.*, 813 F. Supp. 1037, 1045 (S.D.N.Y. 1993); *Fallowfield Dev. Corp. v. Strunk*, Nos. CIV. A. 89-8644, CIV. A. 90-4431, 1993 WL 157723, at *14-15 (E.D. Pa. May 11, 1993); *Commerce Holding Co. v. Buckstone*, 749 F. Supp. 441, 445 (E.D.N.Y. 1990). Having done our own independent analysis of the issue, we must respectfully disagree with the holding of our sister circuit in *KFC Western*.

IV.

Our holding leaves the Furrers without a remedy under § 6972 for the recovery of the costs they have incurred in cleaning up their property. We are not unsympathetic to the Furrers' case, but we cannot justify inferring a remedy under § 6972 for the recovery of cleanup costs when we are unable to find any indication that Congress intended to create such a remedy. "The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law." *Touche Ross*, 442 U.S. at 578. An important part of

the statutory scheme in this case is the preservation of remedies under state law. Counsel represented to the Court at oral argument that the Furrers are pursuing their state law remedies in state court. Nothing in this opinion is intended to hinder them in that pursuit.

For the reasons stated, the judgment of the District Court is affirmed.

BENNETT, District Judge, concurring.

Judicial fathoming of Congressional intent is often treacherous voyage. That is not so here. I wholeheartedly agree with Judge Bowman's well-reasoned and carefully crafted opinion holding that Congress did not intend to create in § 6972 an implied private right of action for the recovery of cleanup costs. I join this opinion unreservedly for I find Judge Bowman's application of the factors identified in *Cort v. Ash*, 422 U.S. 66 (1975), and his divination of Congressional intent, to be unassailable.

The Ninth Circuit Court of Appeals in *KFC Western, Inc. v. Meghrig*, 49 F.3d 518, 523 (9th Cir. 1995), and Judge Fagg, in dissent here, may well be right that it may be "unfair and poor public policy to interpret § 6972(a)(1)(B) as barring restitution actions." However, I would add that under our tripartite system of government, it is for Congress, not the federal courts, to make such policy choices. *See, e.g., Hudson Distribs., Inc. v. Eli Lilly & Co.*, 377 U.S. 386, 395, 84 S. Ct. 1273, 1279-80, 12 L. Ed. 2d 394 (1964); *Baltimore & Ohio Ry. Co. v. Jackson*, 353 U.S. 325, 331, 77 S. Ct. 842, 846, 1 L. Ed. 2d 862 (1957); *Black Hills Institute Of Geological Research v. South Dakota School of Mines & Technology*, 12 F.3d 737, 744 (8th Cir. 1993). The role of the federal courts, "of course, is as interpreters of the words

chosen by Congress, not as policymakers or enlargers of congressional intent." *United States v. Gibbons*, 25 F.3d 28, 33 (lst Cir. 1994).

FAGG, Circuit Judge, dissenting.

For the reasons stated by the Ninth Circuit in *KFC Western, Inc. v. Meghrig*, 49 F.3d 518 (9th Cir. 1995), I believe the Resource Conservation and Recovery Act's citizen suit provision, 42 U.S.C. § 6972(a)(1)(B), authorizes an innocent private purchaser of property contaminated with solid or hazardous waste to bring an equitable action for reimbursement of clean-up costs. Because the statute permits citizens to obtain injunctive or other equitable relief, "a restitutionary remedy . . . falls within the statutory allowance for district court orders that [polluters] take 'such other action as may be necessary.'" *KFC Western*, 49 F.3d at 521 (quoting 42 U.S.C. § 6972(a)(1)(B)). Given this jurisdictional framework, I readily agree with the Ninth Circuit that it "would be unfair and poor public policy to interpret § 6972(a)(1)(B) as barring restitution actions." *Id.* at 523. Thus, I would reverse the district court.

A true copy.

Attest: CLERK, U. S. COURT OF
APPEALS, EIGHTH CIRCUIT.

Supreme Court, U.S.
FILED
AUG 14 1995
CLERK

(3)

No. 95-83

In the Supreme Court

of the

United States

OCTOBER TERM, 1995

ALAN MEGHRIG and MARGARET MEGHRIG,
Petitioners,

vs.

KFC WESTERN, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE WESTERN STATES PETROLEUM ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

DONNA R. BLACK
Counsel of Record
MANATT, PHELPS & PHILLIPS
11355 West Olympic Boulevard
Los Angeles, California 90064
(310) 312-4000
Counsel for Amicus Curiae Western States Petroleum Association

Bowne of Los Angeles, Inc, Law Printers (213) 627-2200

24 pp

TABLE OF CONTENTS

INTEREST OF THE AMICUS CURIAE 1

THE LIKELY IMPACT OF THE EXPANSION OF RCRA CITIZEN SUIT REMEDIES 2

I. SUMMARY OF ARGUMENT 4

II. ARGUMENT 5

A. The Underlying Legislative Framework 5

1. RCRA 5

2. CERCLA 7

3. Subtitle I 10

B. Effect of the Decision Below 13

1. The Creation of a New Loosely-Defined Federal Remedy by the Ninth Circuit is Unwarranted 14

2. If Allowed to Stand, the Decision Below will Significantly Impact the Workload of the District Courts 17

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

City of Chicago v. Environmental Defense Fund, __ U.S. ___, 114 S.Ct. 1588 (1994) 6

Key Tronic Corp. v. United States, ____ U.S.____, 114 S. Ct. 1960 (1994) 8, 9, 15

Middlesex County Sewerage Authority v. National Sea Clammers Assn., 453 U.S. 1 (1981) 18

Washington State Dept. of Transportation v. Washington Natural Gas Co., 51 F.3d 1489 (9th Cir. 1995) 9

Wilshire Westwood Assoc. v. Atlantic Richfield Corp., 881 F.2d 801 (9th Cir. 1989) 10

Statutes

40 C.F.R. §§ 300.400 - 300.440 . . . . . 9, 14

42 U.S.C. § 6691c 11

42 U.S.C. § 6907(a)(2)(A) & (B) 9

42 U.S.C. § 6972 . . . . . 6, 7, 12, 15

42 U.S.C. § 6973 . . . . . 6, 7

42 U.S.C. § 9601(14) 10

42 U.S.C. § 9607(a) 8, 14

42 U.S.C. § 9613(g)(2) 9, 15

Ohio Admin. Code § 1301:7-7-13 12

Miscellaneous

4 W. Rodgers, *Environmental Law* § 7.6(b) (1992) 7, 13

53 Fed. Reg. 37083, 37086, 37097 (Sept. 23, 1988) 3, 17

116 Cong. Rec. 33104 (1970) (comments of Sen. Hart) 18

126 Cong. Rec. H11793-11802 (Dec. 3, 1980) 10

130 Cong. Rec. S2028, S2080 (daily ed. Feb. 29, 1984) (comments of Sen. Durenberger) 11

Calif. Leaking Underground Fuel Tank Field Manual 12

Court Ruling On Cost Recovery Under RCRA Spawns Raft of New Lawsuits, Inside EPA Weekly Report at 1-2 (May 12, 1995) 17

H.R. Rep. No. 1491, 94 Cong., 2d Sess. *reprinted in* 1976 U.S. Code Cong. & Admin. News at 1641-42 6

Oil and Hazardous Substances Liability: Hearings on H.R. 29 & H.R. 85 Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries, 96th Cong., 1st Sess. 177 (1979) 10

S. Cooke, *The Law of Hazardous Waste*, § 1.02 (1995) 6

S. Cooke, *The Law of Hazardous Waste*, § 7.01(2) 10

S. Cooke, *The Law of Hazardous Waste*, § 12.01(2) 8

S. Cooke, *The Law of Hazardous Waste*, § 12.02 8

S. Cooke, *The Law of Hazardous Waste*, § 15.01(1)(a) 7

S. Cooke, *The Law of Hazardous Waste*, § 16.03 (d)(f) 7, 12, 13

S. Cooke, *The Law of Hazardous Waste*, § 17.01(1)(b) 13

No. 95-83

In the Supreme Court of the United States

OCTOBER TERM, 1995

Alan Meghrig and Margaret Meghrig,
Petitioners,
vs.
KFC Western, Inc.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE WESTERN STATES PETROLEUM ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS[1]

INTEREST OF THE AMICUS CURIAE

The Western States Petroleum Association ("WSPA") is an association of 31 companies that together account for the bulk of the petroleum exploration, production, refining, transportation and marketing activities in six western states -- Arizona, California, Hawaii, Nevada, Oregon, and

[1] Written consent to the filing of this amicus brief has been obtained from both parties and separately filed with the Court.

Washington.[2] Unlike petitioners, who owned only one commercial property upon which a gas station was formerly located, WSPA's member companies own and have owned thousands of such properties. WSPA is thus well positioned to discuss the important questions raised by the Ninth Circuit's decision and the significant impact of that decision on affected parties as well as on the workload of the district courts.

If not reviewed and reversed by this Court, the Ninth Circuit decision will, for the first time, allow petroleum contamination cleanup cost recovery actions to proceed in federal court. Congress expressly excluded petroleum product cleanups from the reach of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and limited the remedies provided by the citizen suit provisions of the Resource Conservation and Recovery Act ("RCRA") to injunctive relief. As a result, actions to recover costs for cleaning up property contaminated by petroleum products have been brought exclusively in state courts pursuant to various statutory and common law theories.

THE LIKELY IMPACT OF THE EXPANSION OF RCRA CITIZEN SUIT REMEDIES

The potential impact of the Ninth Circuit's expansion of RCRA citizen suit remedies on federal district courts is staggering. A few years ago, the United States Environmental Protection Agency ("EPA") estimated that over two million underground storage tanks containing

---

[2] WSPA's members also account for the majority of these activities nationally, although WSPA focuses on activities in the six western states listed above.

petroleum products were in operation in the United States. 53 Fed. Reg. 37083 (Sept. 23, 1988). These tanks were located at over 700,000 facilities nationwide. *Id.* Based upon a study of over 10,000 tanks, EPA concluded that approximately 25 percent of those underground petroleum tanks had leaked. *Id.* at 37086. EPA also estimated that the "number of sites needing significant cleanup ... is expected to be in the *tens of thousands* nationwide." *Id.* at 37097 (emphasis added). That number is almost unquestionably higher now.

In preparation for submitting this brief, WSPA polled several of its member companies. Information was sought on the number of service stations owned by member companies and the amount of pending litigation concerning underground petroleum tanks. One company reported that it currently owned about 1,000 service station properties in the western United States and stated that it had owned over 16,000 gas station properties in that region historically. A second company reported owning about 3,000 gas stations nationwide and stated that it had owned over 9,000 gas station properties within the last 10 years. A third company reported owning about 4,000 gas stations nationwide, but could provide no historical ownership information. A fourth company reported owning over 1,000 service stations and stated that it had owned over 25,000 service station properties since the early 1900's.

These four companies also reported being named as defendants in over 1,600 actions for recovery of petroleum contamination cleanup costs brought in state courts over the past five to ten years. Approximately one-third to one-half of these cases are still pending.

Although the results of the informal survey conducted here are not definitive, a clear indication of the magnitude of

the impacts emerges when the responses are considered in light of EPA's published data. EPA reported that underground petroleum tanks were located at over 700,000 *active* facilities nationwide *in the year 1988*. Given the significant downsizing in the retail marketing end of the petroleum industry both before and after 1988, confirmed by the large number of *former* gas station properties reportedly owned by the surveyed companies, it would appear that underground petroleum tanks historically have been located at well over one million, and perhaps at several million, properties.

EPA also reported that tens of thousands of underground petroleum tank properties would require "significant cleanup." Given that just the four WSPA member companies surveyed reported being named as defendants in over 1,600 petroleum tank cleanup cases, EPA's estimate appears accurate. Extrapolating from the information obtained from WSPA members, it is a reasonable estimate that well over 10,000 underground petroleum storage tank cost recovery actions have been filed in the state courts in the past five to ten years and that several thousand such cases are currently pending.

I. SUMMARY OF ARGUMENT

The decision below would result in shifting the forum for virtually all petroleum cleanup cost recovery actions from state court to federal court. A RCRA "cost recovery" action would also create a series of inconsistencies, anomalies and uncertainties in cost recovery law. The guidelines for such a unique cost recovery action are ill-defined or undefined and create substantial uncertainty. In addition, RCRA encompasses "solid waste" as well as "hazardous waste." Thus, cost recovery actions could be brought in federal court for cleanups of a much broader universe of materials than

currently authorized under CERCLA, including petroleum, an anomalous situation. Moreover, the RCRA statute has no express limitations period, a notable inconsistency with other cost recovery statutes. Finally, the RCRA statute does have an attorney's fees provision, even though CERCLA, the touchstone cost recovery statute, does not.

II. ARGUMENT

While the industrial revolution has produced many useful benefits for society, many industrial processes and practices which were not only completely legal, but which were widely perceived to be safe and even state-of-the-art at the time, have resulted in the contamination of numerous properties across the country. This issue first arose in the 1970s and resulted in the enactment of three federal statutes: (1) the Resource Conservation and Recovery Act of 1976 ("RCRA"); (2) the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"); and (3) the underground storage tank provisions of Subtitle I of RCRA enacted as part of the Hazardous and Solid Waste Amendments of 1984 ("Subtitle I").

We will briefly review the relevant portions of RCRA, CERCLA and Subtitle I that comprised federal statutory contamination cleanup law prior to the Ninth Circuit's decision below in order to show that that decision is completely contrary to the underlying legislative framework. We will then illustrate the impacts of the decision on the federal district courts and on the petroleum industry.

A. The Underlying Legislative Framework

1. RCRA

RCRA was signed into law in October 1976. The

RCRA legislation completely replaced the former Solid Waste Disposal Act with nine new subtitles, denominated A though H, addressing the management of hazardous and solid wastes. S. Cooke, *The Law of Hazardous Waste*, § 1.02 (1995) ("*Cooke*"). As this Court has noted, "RCRA is a comprehensive environmental statute that empowers EPA to regulate hazardous wastes from cradle to grave, in accordance with the rigorous safeguards and management procedures of Subtitle C" and to regulate solid waste under the "much ... loose[r]" procedures of Subtitle D. *City of Chicago v. Environmental Defense Fund*, __ U.S. ___, 114 S.Ct. 1588, 1590 (1994).

At the time of its passage, RCRA was viewed as closing the "last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes." H.R. Rep. No. 1491, 94 Cong., 2d Sess. *reprinted in* 1976 U.S. Code Cong. & Admin. News at 1641-42. With respect to contamination of property by solid and hazardous wastes, RCRA remains largely prospective in nature -- it is designed primarily to prevent future occurrences of property contamination.

However, two provisions of RCRA do provide a mechanism for reaching past activities that have caused property contamination: (1) the "imminent hazard" provision, 42 U.S.C. § 6973, and (2) the citizen suit provision, 42 U.S.C. § 6972. Under the imminent hazard provision, the Administrator of the EPA is authorized to file suit against any person who has contributed, or who is contributing, to the past or present handling or disposal of a hazardous or solid waste that "may present an imminent or substantial endangerment to human health or the environment." 42 U.S.C. § 6973. If the EPA finds the requisite danger present, it may seek an injunction in district court "to require that the liable parties refrain from

potentially harmful activity, and undertake any action necessary to abate the hazard." *Cooke*, § 15.01(1)(a). The EPA is also provided with authority to issue "such orders as may be necessary to protect public health and the environment." 42 U.S.C. § 6973(a).

The citizen suit provision of RCRA authorizes a citizen-plaintiff to file suit in district court against a person who has contributed, or who is contributing, to the past or present handling or disposal of a solid or hazardous waste that "may present an imminent and substantial endangerment to human health or the environment." 42 U.S.C. § 6972(a)(1)(B). The district court has jurisdiction to "restrain" a liable party, to "order such person to take such other action as may be necessary, or both." *Id.* As a leading treatise on hazardous waste law has stated, "[i]t is well settled that, under [the RCRA citizen suit provision], as is the case with the C[lean] W[ater] A[ct], an award of damages to the plaintiff is not permitted." *Cooke*, § 16.03 (d)(f); *see also*, 4 W. Rodgers, *Environmental Law* § 7.6(b) (1992).[3]

2. CERCLA

As noted above, RCRA is largely prospective in operation and regulates the handling and disposal of solid and hazardous waste. Congress recognized "that while RCRA amply addressed the management of hazardous wastes from

---

[3] In the decision below, the Ninth Circuit Court of Appeals ruled that the RCRA citizen suit provision, 42 U.S.C. § 6972(a)(1)(B), provides for the recovery of costs expended in cleaning up hazardous waste and solid waste because the statutory language providing the district courts with jurisdiction to "order such person to take such other action as may be necessary" is broad enough to encompass not only mandatory injunctive relief but money damages in the form of recovery of cleanup costs expended.

generation through disposal, it provided *only limited authority* to clean up wastes that had been improperly disposed of." *Cooke*, § 12.02(3) (emphasis added). This, coupled with several well known incidents of environmental contamination, including particularly the Love Canal site in New York, led to the passage of CERCLA in 1980. *Id.*, § 12.02(2). CERCLA is now the "centerpiece of the federal hazardous substance cleanup and liability program." *Id.*, § 12.01(2).

CERCLA provides the federal government with "broad power to command private parties and other government agencies to clean up hazardous waste sites." *Key Tronic Corp. v. United States*, ___ U.S.___, 114 S. Ct. 1960, 1964 (1994). The federal government, generally acting through the EPA, may undertake the cleanup itself or may attempt to compel liable parties to undertake the cleanup. *Cooke*, § 12.01(2). Thus, CERCLA, which is largely retrospective in operation, provides a cost recovery mechanism pursuant to which the federal government may file suit in district court to recover its cleanup expenses from liable parties. 42 U.S.C. § 9607(a).

The CERCLA cost recovery cause of action is also available to private party plaintiffs who effectuate a cleanup. CERCLA provides that:

> "[A]ny person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of
>
> * * *
>
> shall be liable for --
>
> (A) all costs of removal or remedial action

> incurred by the United States Government or a State or an Indian Tribe not inconsistent with the National Contingency Plan; [or]
>
> (B) any other necessary costs of response *incurred by any other person* consistent with the National Contingency Plan.

42 U.S.C. § 6907(a)(2)(A) & (B) (emphasis added).

By providing a private party cost recovery cause of action, CERCLA allows owners of property contaminated with hazardous substances to clean up their property and then seek recovery of their cleanup expenses in the federal courts, from liable parties under CERCLA. Former owners or lessees of contaminated property are typical defendants in a CERCLA private party cost recovery action.

There are, however, some restrictions on the recovery of cleanup costs in these cases. First, the costs incurred must be consistent with the National Contingency Plan ("NCP"). *Washington State Dept. of Transportation v. Washington Natural Gas Co.*, 51 F.3d 1489 (9th Cir. 1995). The NCP contains detailed procedures on how cleanups are to be conducted and covers nearly thirty pages in the Code of Federal Regulations. 40 C.F.R. §§ 300.400 - 300.440. Second, an action must be brought within the statutory limitations period. 42 U.S.C. § 9613(g)(2). Third, attorney's fees are not recoverable in a CERCLA cost recovery action. *Key Tronic Corp. v. United States*, *supra*, 114 S. Ct. 1960.

Finally, there is no cost recovery under CERCLA for cleanup of petroleum product contamination, but only for cleanup of "hazardous substances." The term "hazardous substance" is defined in CERCLA and explicitly "does not

include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance" elsewhere in CERCLA. 42 U.S.C. § 9601(14); *Wilshire Westwood Assoc. v. Atlantic Richfield Corp.*, 881 F.2d 801 (9th Cir. 1989).[4]

3. Subtitle I

The Hazardous and Solid Waste Amendments of 1984 were the first federal enactments to address underground petroleum storage tanks. Pub. L. No. 86-616, 98 Stat. 3221-93 *codified at* 42 U.S.C. §§ 6991 - 6991i. This legislation created Subtitle I of RCRA (not the subject of the pending writ petition) which directed the EPA to establish regulations for leak detection and cleanup of contamination at existing tanks and to establish standards for the installation and operation of new tanks. *Cooke*, § 7.01(2).

The legislative history of Subtitle I offers a noteworthy analysis of the reasons why it was enacted:

> Underground storage tanks are seldom regulated. At present [1984], Federal

---

[4] This definitional exclusion is commonly referred to as the "CERCLA petroleum exclusion." Early subcommittee testimony on the CERCLA legislation evinced Congressional awareness that petroleum contamination posed less of a threat to public health than those chemicals that later came to be defined as "hazardous substances." *Oil and Hazardous Substances Liability: Hearings on H.R. 29 & H.R. 85 Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. 177 (1979). The legislative debates on the final compromise language of CERCLA indicated that Congress intended to enact subsequent legislation on petroleum contamination. *See* 126 Cong. Rec. H11793-11802 (Dec. 3, 1980).

> regulation of storage tanks covers only above-ground tanks containing chemical wastes. And, if a tank is leaking, the Federal Government cannot under [CERCLA] authority respond or clean up a spill if it involves petroleum products.
>
> * * *
>
> The tank storage of one of the most common underground contaminants -- gasoline -- is unregulated because it is not a waste product (and thus not governed under the authority of [RCRA]) and spills of the fuel cannot be cleaned up under [CERCLA] because it is a petroleum product.
>
> 130 Cong. Rec. S2028, S2080 (daily ed. Feb. 29, 1984) (comments of Sen. Durenberger).

Congress provided a mechanism in the Subtitle I legislation for the states to enact their own legislation and to adopt regulations governing underground petroleum tanks that would supersede the federal legislation and regulations. 42 U.S.C. § 6691c. Prodded by Subtitle I, virtually all states have adopted laws and promulgated regulations governing underground petroleum tanks. In practical terms, this means that a party installing, operating or cleaning up contamination from a tank only refers to applicable state laws and regulations in conducting its activities. These activities are generally regulated and overseen by state agencies that have been delegated these duties by state statute. It is critical to note, however, that *Subtitle I provides no cost recovery cause of action in favor of parties who expend costs cleaning up petroleum contamination from underground tanks.*

In sum, then, the federal statutory framework governing property contamination litigation is as follows: (1) RCRA is largely designed to prevent future contamination problems, and is limited to injunctive relief only. (2) CERCLA provides authority for the cleanup of past incidents of contamination, and allows a private party who cleans up "hazardous substance" contamination (not by petroleum products) to recover its costs in federal court pursuant to the CERCLA cost recovery cause of action. (3) Petroleum contamination is addressed by state agencies pursuant to state laws and regulations.[5] These state programs were encouraged by federal Subtitle I legislation, which itself provided no cost recovery cause of action.

Because of CERCLA's petroleum exclusion, parties who clean up property contaminated by petroleum from an underground tank cannot bring a CERCLA cost recovery action in federal court. Neither can parties who clean up petroleum contamination on their property bring a cost recovery action in federal court pursuant to Subtitle I because Subtitle I does not provide for such a cause of action. And, until the Ninth Circuit's decision in *KFC Western, Inc. v. Meghrig*, it was well settled that such parties could not bring a cost recovery action in federal court under the RCRA citizen suit provision, 42 U.S.C. § 6972, because only injunctive relief was available under that provision.[6] *Cooke*,

---

[5] Many states have detailed and complex formulae set forth in regulations and guidance documents to determine how clean is clean. *E.g.* Ohio Admin. Code § 1301:7-7-13; Calif. Leaking Underground Fuel Tank Field Manual.

[6] The RCRA citizen suit provision authorizes a citizen-plaintiff to obtain a prohibitory injunction to halt on-going contamination or a mandatory injunction to compel abatement of (continued...)

§ 16.03(d), (f); 4 Rogers § 7.6(b). However, in large part because of Subtitle I, parties seeking monetary damages in these circumstances had available to them a full array of state common law and statutory causes of action in state court.[7]

B. Effect of the Decision Below

The decision below, if not reviewed and reversed by this Court, will significantly alter the above-described legislative framework. This, in turn, will result in a series of inconsistencies, anomalies and uncertainties in the law of hazardous substance and petroleum contamination cleanup. In addition, of course, the creation of a new federal remedy in an area as active as petroleum contamination cost recovery

---

[6](...continued)
existing contamination. This provision applies to both hazardous waste and solid waste. Solid waste arguably includes petroleum contamination. However, the relief available is limited to injunctive relief. Cost recovery is not expressly provided for in the RCRA citizen suit provision.

[7] A leading treatise in the area has noted that "[i]n the absence of federal or state statutes creating private causes of action, private suits involving damage to... property [from contamination] are brought under common law tort principles." *Cooke*, § 17.01(1)(b). Because of the CERCLA petroleum exclusion, lack of a cost recovery cause of action under Subtitle I and the limitation of RCRA citizen suits to injunctive relief, all actions to recover costs expended in cleaning up petroleum contamination have been brought in state court. Although additional causes of action may be available in some jurisdictions under certain factual situations, most petroleum contamination cases proceed under three common law causes of action -- trespass, nuisance and negligence.

cannot help but significantly impact the workload of the federal district courts.

1. The Creation of a New Loosely-Defined Federal Remedy by the Ninth Circuit is Unwarranted

In ruling that the RCRA citizen suit provision allows plaintiffs to recover costs expended in cleaning up hazardous wastes or solid wastes, the Ninth Circuit has created a new federal remedy. Because this "citizen suit cost recovery action" was never intended by Congress, it is ill-defined and does not mesh with the existing statutory structure.

For example, RCRA provides no standards for determining which costs expended by a plaintiff are recoverable in a citizen suit cost recovery action. In contrast, under CERCLA, a private party can recover only costs that are necessary and consistent with the National Contingency Plan. 42 U.S.C. § 9607(a). The NCP contains detailed procedural requirements intended to ensure that cleanups are well designed, well implemented and cost effective. 40 C.F.R. §§ 300.400 - 300.440. The lack of such standards under RCRA is anomalous given the Congressional prescription for such standards under CERCLA. Further, this lack of standards is strong evidence that Congress did not intend the RCRA citizen suit provision to be a cost recovery mechanism. If the decision below is allowed to stand, the federal courts will need to engage in extensive interstitial lawmaking to define which costs are recoverable under a RCRA citizen suit cost recovery action. Substantial uncertainty over the proper standards to apply in evaluating costs incurred will prevail until sufficient case law develops.

RCRA provides no statute of limitations for citizen suit cost recovery actions. Again, in contrast, CERCLA

provides an express statute of limitations for cost recovery actions. 42 U.S.C. § 9613(g)(2). The lack of a statute of limitations under RCRA is also strong evidence that Congress did not intend the RCRA citizen suit provision to act as a cost recovery mechanism. If the decision below is allowed to stand, the district courts will be required to resolve this issue as well, and substantial uncertainty and unevenness of decisions will exist for some time.[8]

WSPA is aware of petroleum contamination cost recovery cases that are currently being brought under the RCRA citizen suit provision for cleanups that were completed a half dozen or more years ago. This new situation contrasts sharply with the law prior to the decision of the Ninth Circuit when well understood state statutes of limitations for tort actions controlled.

The RCRA citizen suit provision expressly provides that attorney's fees may be awarded to the prevailing party. 42 U.S.C. § 6972(e). It is a long-standing American rule of law that attorney's fees are not recoverable. *See, Key Tronic*, *supra*, 114 S.Ct. at 1965. Attorney's fees are not recoverable in private party CERCLA cost recovery actions, nor are attorney's fees generally recoverable in cost recovery cases brought under state common law theories. In all likelihood, Congress decided to allow an attorney's fees award in the context of the RCRA citizen suit provision due

---

[8] The Ninth Circuit's opinion below has suggested that the doctrine of laches "will alleviate any unfairness that might be created by the lack of a limitations period under RCRA." Pet. App. at A9. This suggestion is troubling both because it will encourage stale claims and because it injects tremendous uncertainty into the law, whereas contamination cases brought in state courts have well-settled limitation periods.

to the limited nature of the relief Congress was providing -- prohibitory and mandatory injunctive relief.

If the Ninth Circuit's ruling is allowed to stand, several anomalies will be created. Attorney's fees will be recoverable in a federal "cost recovery" action brought under RCRA, but not under CERCLA. Thus, CERCLA -- the statute designed to address the less numerous but potentially more dangerous hazardous substance sites -- will provide a less comprehensive remedy, from a plaintiff's perspective, than the RCRA citizen suit provision. The end result is clear: all parties seeking cost recovery for any type of contamination cleanup will bring a RCRA citizen suit action instead of, or in addition to, a CERCLA claim in an effort to recover attorney's fees. And, because attorney's fees would be recoverable in federal court under RCRA, petroleum "cost recovery" actions will be brought in federal court instead of in state court where attorney's fees are not recoverable.

Further, the movement of underground petroleum storage tank cleanup litigation from state to federal courts would be an unfortunate development because the state courts are the more logical forum for resolution of these disputes. As noted above, virtually all states have passed laws and promulgated regulations governing underground petroleum tanks. Accordingly, regulatory decisions regarding underground tanks generally occur at the state level. Determinations as to whether a tank cleanup was done properly, cost-effectively and in a timely manner, and whether the level of cleanup satisfies applicable standards are all questions of state law.

State courts have been deciding tank cleanup cases for a decade, and a body of case law, based on common law tort concepts, has developed. The state common law courts of general jurisdiction are ideally suited to resolve disputes of

this nature by applying general rules of decision to the facts of the cases before them. In addition, the respective obligations of current and former lessees and landowners that are at the center of most underground petroleum tank cleanup cases are matters historically determined by state law.

2. If Allowed to Stand, the Decision Below will Significantly Impact the Caseload of the Federal District Courts

As previously described, the EPA has estimated that, a few years ago, over two million underground petroleum tanks were in operation at over 700,000 facilities nationwide. 53 Fed. Reg. 37083 (Sept. 23, 1988). EPA has estimated that 25 percent of these tanks have leaked. *Id.* at 37086. Thus, approximately 175,000 properties nationwide may have been contaminated by operation of underground petroleum tanks.

As a result of the Ninth Circuit's decision, plaintiffs will be highly motivated to bring petroleum cost recovery suits in federal court under RCRA because of the possibility of recovering attorney's fees. In addition, plaintiffs who are barred from proceeding in state court on statute of limitations grounds will file in federal court where an uncertain, but potentially much longer, limitations period may apply. The end result will be that virtually all underground tank litigation will shift to federal court. As noted by Petitioners, this trend may have already begun. Pet. at 22-23 *citing Court Ruling On Cost Recovery Under RCRA Spawns Raft of New Lawsuits*, Inside EPA Weekly Report at 1-2 (May 12, 1995) (quoting industry spokespersons predicting that "hundreds" of underground petroleum tank cases will soon be filed in the district courts of the Ninth Circuit alone).

It would be ironic if the construction placed upon the RCRA citizen suit provision by the Ninth Circuit resulted in unduly burdening the federal courts. Congress took great pains to avoid just this result when it adopted the first environmental citizen suit provision 25 years ago. This is clearly indicated in Congressional debates such as the following:

> "It has been argued, however, that conferring additional rights on the citizen may burden the courts unduly. *I would argue that the citizen suit provision of [this bill] has been carefully drafted to prevent this consequence from arising*. First of all, it should be noted that the bill makes no provision for damages to the individual. It therefore provides no incentives to suit other than to protect the health and welfare of those suing and others similarly situated. *It will be the rare, rather than the ordinary, person, I suspect, who with no hope of financial gain and the very real prospect of financial loss, will initiate court action under this bill.*"
>
> 116 Cong. Rec. 33104 (1970) (comments of Sen. Hart) *quoted in Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1 n.27 (1981) (emphasis added).

The Ninth Circuit's decision takes this very precise indication of legislative intent -- and over a decade of judicial decisions which have adhered to it -- and stands them on their head. Such an arbitrary and ill-founded construction of the law should not be countenanced by this Court.

CONCLUSION

If left to stand, the Ninth Circuit's decision below will work a massive disruption of well-settled principles of federal environmental law and underground petroleum tank litigation. The federal courts will be inundated with new cases better brought in state court, contrary to clearly expressed Congressional intent. Those subject to cost recovery actions under RCRA, which will in some cases involve WSPA member companies, will be subject to a myriad of uncertainties in the litigation process. For these reasons, WSPA respectfully urges this Court to issue the Writ of Certiorari sought by the petitioners.

Dated: August 11, 1995.

Respectfully submitted,

Donna R. Black
Counsel of Record
MANATT, PHELPS & PHILLIPS
11355 West Olympic Boulevard
Los Angeles, California 90064
(310) 312-4000
Counsel for Amicus Curiae Western States Petroleum Association

(15)

Supreme Court, U.S.
FILED
AUG 14 1995
CLERK

NO. 95-83

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ALAN MEGHRIG AND MARGARET MEGHRIG
Petitioners,

v.

KFC WESTERN, INC.
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF KAUFMAN AND BROAD HOME CORPORATION AND KAUFMAN AND BROAD - SOUTH BAY, INC. AS AMICI CURIAE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

William N. Kammer
Counsel of Record
Gray Cary Ware & Freidenrich
A Professional Corporation
401 B Street, Suite 1700
San Diego, California 92101
619-699-2711

Counsel for Kaufman and Broad Home Corporation and Kaufam and Broad - South Bay, Inc.

NO. 95-83

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ALAN MEGHRIG AND MARGARET MEGHRIG
Petitioners,

v.

KFC WESTERN, INC.
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF KAUFMAN AND BROAD HOME CORPORATION AND KAUFMAN AND BROAD - SOUTH BAY, INC. AS AMICI CURIAE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

William N. Kammer
Counsel of Record
Gray Cary Ware & Freidenrich
A Professional Corporation
401 B Street, Suite 1700
San Diego, California 92101
619-699-2711

Counsel for Kaufman and Broad Home Corporation and Kaufam and Broad - South Bay, Inc.

TABLE OF CONTENTS

Page

STATUTES INVOLVED 2

STATEMENT OF INTEREST OF AMICI CURIAE . . 3

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I THE NINTH CIRCUIT CORRECTLY DETERMINED THAT THE RCRA CITIZEN SUIT PROVISION AUTHORIZES PRIVATE PARTIES TO SEEK EQUITABLE RESTITUTION OF THEIR RESPONSE COSTS 6

A. The Broad Grant of Authority in RCRA Section 7002(a)(1)(B) Allows a Court to Order a Party to Make Equitable Restitution 6

B. Analysis of RCRA Section 7002(a) in Relation to RCRA Section 7003 Confirms That Private Parties Are Entitled to Restitution of Their Response Costs 10

II THE NINTH CIRCUIT CORRECTLY DETERMINED THAT KFC SATISFIED THE "IMMINENT AND SUBSTANTIAL ENDANGERMENT" REQUIREMENT 12

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Bayless Investment & Trading Co. v. Chevron U.S.A.
39 Env't Rep. Cas. (BNA) 1428
(D. Ariz. 1994) 14

C.B.S., Inc. v. ASCAP
320 F. Supp. 389 (S.D.N.Y. 1970) 9

California v. American Stores Co.
495 U.S. 271 (1990) 7

Cort v. Ash
422 U.S. 66 (1975) 8

Gwaltney v. Chesapeake Bay Found.
484 U.S. 49 (1987) 12, 13, 14

Hatco Corp. v. W.R. Grace & Co.--Conn.
859 F. Supp. 769 (D.N.J. 1994) 9

Hecht Co. v. Bowles
321 U.S. 321 (1944) 7

KFC Western, Inc. v. Meghrig
49 F.3d 518, 523
(9th Cir. 1995) 3, 4, 10, 11, 13, 14

Kaufman and Broad-South Bay, Inc. v. Unisys Corporation et al.
No. C-92-20677
822 F. Supp. 1468 (N.D. Cal. 1993) 3, 4

Lincoln Properties, Ltd. v. Higgins
24 Env't.L.Rep. 10491
(E.D. Cal. 1993) 9

Middlesex County Bd. of Chosen Freeholders v. N.J.
645 F. Supp. 715 (D.N.J. 1986) 11

Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n
453 U.S. 1 (1981) 8, 13

Porter v. Warner Holding Co.
328 U.S. 395 (1946) 7

Thaler v. PRB Metal Products, Inc.
810 F. Supp. 49 (E.D.N.Y. 1993) 9

United States v. Aceto Agric. Chems. Corp.
872 F.2d 1373 (8th Cir. 1989) . 5, 11, 12, 13, 14

United States v. Conservation Chem. Co.
619 F. Supp. 162 (W.D. Mo. 1985) 12

United States v. Long
537 F.2d 1151 (4th Cir. 1975), cert. denied,
429 U.S. 871 (1976) 10

United States v. Mottolo
605 F. Supp. 898 (D.N.H. 1985) 9

United States v. Northeastern
Pharmaceutical & Chem. Co.
810 F.2d 726 (8th Cir. 1986), cert. denied,
484 U.S. 848 (1987) 5, 9, 12

United States v. Price
688 F.2d 204 (3d Cir. 1982) 5, 9, 12, 14

United States v. Valentine
856 F. Supp. 627 (D. Wyo. 1994) 10

United States v. Whiting Milk Co.
21 F. Supp. 321 (D. Mass. 1937),
aff'd sub nom., H.P Hood & Sons, Inc. v.
United States, 97 F.2d 677 (1st
Cir. 1938), aff'd, 307 U.S. 588 (1939) 9

STATUTES

33 U.S.C. section 1365(a) of the Federal Water
Pollution Control Act 8

33 U.S.C. section 1415(g) of the Marine
Protection, Research and Sanctuaries Act 8

42 U.S.C. section 6972 10

42 U.S.C. section 6972(a) 5, 6

42 U.S.C. section 6972(a)(1)(B) 2, 3, 4

42 U.S.C. section 6973 . . . . . 5, 10

42 U.S.C. section 9606(a) 7

Section 7002 of RCRA 5, 10

Section 7002(a) of RCRA 6, 7, 8, 10, 11

Section 7002(a)(1)(B) of RCRA 2, 3, 4, 6, 8, 13

Section 7003 of RCRA 5, 10, 11, 12

Section 106(a) of CERCLA 7

MISCELLANEOUS

H.R. Rep. No. 198, 98th Cong., 2d Sess.,
Pt I, 53 (1983) (1984 U.S.C.C.A.N. 5576) . . 11

S. Rep. No. 284, 98th Cong., 1st Sess.,
56-57 (1983) (1984 U.S.C.C.A.N. 5576) . . . 11

J. Martin Robertson, "Restitution Under RCRA
§ 7002(a)(1)(B): The Courts Finally Grant
What Congress Authorized,"
25 Env't.L.Rep. 10491 (September 1995) 6, 11, 12

NO. 95-83

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ALAN MEGHRIG AND MARGARET MEGHRIG
Petitioners,

v.

KFC WESTERN, INC.
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF KAUFMAN AND BROAD HOME CORPORATION AND KAUFMAN AND BROAD - SOUTH BAY, INC. AS AMICI CURIAE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Kaufman and Broad Home Corporation and Kaufman and Broad-South Bay, Inc. (collectively "Kaufman and Broad") respectfully submit this amici curiae brief in opposition to the Petition for Certiorari. Kaufman and Broad have obtained the consent of the parties as provided for in Rule 37 of the rules of this court. See Appendix A.

STATUTES INVOLVED

Title 42 of the United States Code, section 6972(a)(1)(B), also known as section 7002(a)(1)(B) of the Resource Conservation and Recovery Act (RCRA), provides in pertinent part:

> Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf--
>
> (1)(B) against any person, including the United States, and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment;
>
> . . . .
>
> The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties . . . to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to

> order such person to take such other action as may be necessary, or both . . . .

42 U.S.C. section 6972(a)(1)(B).

STATEMENT OF INTEREST OF AMICI CURIAE

Kaufman and Broad-South Bay, Inc. is a real estate development company that developed for residential use approximately one hundred acres of real property in Milpitas, California. After discovering that hundreds of barrels of toxic waste had been dumped and buried on the property years before by others, Kaufman and Broad-South Bay spent over $26 million to remedy the dangerous conditions at the site. Kaufman and Broad-South Bay, Inc. is a wholly owned subsidiary of Kaufman and Broad Home Corporation. Subsidiaries of Kaufman and Broad Home Corporation develop homes throughout the State of California. In October, 1992, Kaufman and Broad-South Bay filed an action in the United States District Court for the Northern District of California, captioned Kaufman and Broad-South Bay, Inc. v. Unisys Corporation, et al., No. C-92-20677 EFL, which remains pending in that court. On May 7, 1993, in an order published at 822 F. Supp. 1468 (N.D. Cal. 1993), the district court dismissed that portion of Kaufman and Broad-South Bay, Inc.'s complaint that seeks restitution of response costs under section 7002(a)(1)(B) of RCRA, 42 U.S.C. section 6972(a)(1)(B).

Petitioners here seek review of a decision of the United States Court of Appeals for the Ninth Circuit that expressly "disapprove[s] of the reasoning used by district courts that have dismissed complaints brought under section 6972(a)(1)(B) to the extent the plaintiffs sought reimbursement of clean-up costs." KFC Western, Inc. v. Meghrig, 49 F.3d 518, 523 (9th Cir. 1995). In the ruling challenged here, the Ninth Circuit specifically identifies

the district court order dismissing Kaufman and Broad-South Bay's claim for restitution of response costs as one of the two decisions it criticized. Accordingly, the Ninth Circuit's decision, which is binding on the United States District Court for the Northern District of California, makes it clear that the order dismissing Kaufman and Broad-South Bay, Inc.'s claim for equitable restitution of its response costs cannot stand.

On July, 25, 1995, Kaufman and Broad-South Bay, Inc. moved the district court to reinstate its claim for restitution of response costs under section 7002(a)(1)(B) of RCRA in light of the Ninth Circuit's decision.[1] If the Ninth Circuit's decision is reversed in this case, Kaufman and Broad-South Bay, Inc. will lose an important means of recovering from the responsible parties the millions of dollars it has spent to remedy dangerous environmental contamination that it did not create.

SUMMARY OF ARGUMENT

This case involves the construction of the citizen suit provision set forth in section 7002(a)(1)(B) of RCRA, codified at 42 U.S.C. section 6972(a)(1)(B). The Ninth Circuit, in determining what it described as "a question of first impression," ruled below that "the RCRA citizen suit provision authorizes a private plaintiff to collect restitution of clean-up costs." KFC Western, Inc. v. Meghrig, 49 F.3d 518, 520 (9th Cir. 1995). The

---

[1] See Kaufman and Broad-South Bay, Inc. v. Unisys Corporation, et al., No. C-92-20677 EFL, Plaintiff's Motion By Way of Reconsideration Or, In the Alternative, A Motion for Leave to Amend Its Complaint to Reinstate Claim for Restitution Against Unisys Corporation and In Support of Plaintiff's Motion to Add Claim for Restitution Against Trucking Companies (N.D. Cal. July 25, 1995).

Ninth Circuit's decision is consistent with decisions of the Third and Eighth Circuits interpreting identical language found in section 7003 of RCRA, codified at 42 U.S.C. section 6973. See United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373 (8th Cir. 1989); United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987); United States v. Price, 688 F.2d 204 (3d Cir. 1982). No United States Court of Appeals has decided to the contrary.[2]

As the consistent federal appellate authority supporting the decision below attests, the Ninth Circuit's determination is clearly correct. The RCRA citizen suit provision is expressly directed to past conduct and expressly permits a court to order a party responsible for endangering health or the environment "to take such other action as may be necessary." 42 U.S.C. section 6972(a). This statutory language provides clear authority for a court to order a responsible party to make equitable restitution to those who have addressed and alleviated the dangerous condition. Contrary to Petitioners' arguments, the Ninth Circuit has not created a new right of action by implication; it has simply recognized that the right of action already provided by Congress permits an order of equitable restitution. Petitioners do not attempt to argue why the identical language in RCRA sections 7002 and 7003 should be interpreted inconsistently, nor do Petitioners distinguish or even address substantively the Third and Eighth Circuit decisions cited above.

---

[2] Petitioners attempt to create a circuit conflict by relying on the self-interested assessment of an oral argument before the Eighth Circuit to support the assertion that the decision below "Will Likely Also Conflict With [An] Impending Eighth Circuit Decision." Petition, at 9-10, 21. Petitioners cannot manufacture a conflict, however, merely by a wishful look at their ouija board.

Accordingly, the petition for a writ of certiorari should be denied.

ARGUMENT

I

THE NINTH CIRCUIT CORRECTLY DETERMINED THAT THE RCRA CITIZEN SUIT PROVISION AUTHORIZES PRIVATE PARTIES TO SEEK EQUITABLE RESTITUTION OF THEIR RESPONSE COSTS

A. The Broad Grant of Authority in RCRA Section 7002(a)(1)(B) Allows a Court to Order a Party to Make Equitable Restitution.

Section 7002(a) of RCRA, 42 U.S.C. section 6972(a), expressly confers on the district courts the power to order persons who have caused or contributed to contamination "to take such other action as may be necessary." This broad equitable jurisdiction includes the authority to grant restitution and injunctive relief to private parties faced with contamination that may present an endangerment to the environment or human health.[3] Unless specifically limited, Congress' grant of equitable jurisdiction to the courts is not restricted but is presumed to include all of the traditional equitable powers that the courts have historically exercised. As this Court has stated:

---

[3] Congress' broad grant of equitable jurisdiction under RCRA Section 7002(a)(1)(B) is discussed in detail in a forthcoming article. See J. Martin Robertson, "Restitution Under RCRA § 7002(a)(1)(B): The Courts Finally Grant What Congress Authorized," 25 Env't.L.Rep. 10491 (September 1995).

> Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction."

Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) (quoting Brown v. Swann, 35 U.S. 497 (1836)). Accord California v. American Stores Co., 495 U.S. 271, 295 (1990); Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944).

Nothing in section 7002(a)'s broad grant of jurisdiction, by words or inference, limits the district courts' jurisdiction to certain kinds of equitable relief -- for example, as Petitioners suggest, to orders compelling "contamination cleanup" or to actions "required to stabilize and/or eliminate the imminent and substantial endangerment." Petition, at 11-12. To the contrary, if Congress had intended such a limitation, it would have been a simple matter to draft the statute so that courts were limited to ordering only "relief as may be necessary to abate such danger or threat," instead of broadly providing that courts may order responsible parties to take any necessary action. Cf. section 106(a) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. section 9606(a) (authorizing the President to require the Attorney General "to secure such relief as may be necessary to abate such danger or threat"). To paraphrase Petitioners, when Congress intends relief to be limited to abatement, it expressly says so. Cf. Petition, at 18. In enacting the RCRA citizen suit provision, Congress simply did not impose the limitation that Petitioners now seek to engraft onto the statute. Instead, it conferred on district courts the full power to grant any appropriate equitable relief in light of the necessities of the case.

The Ninth Circuit's reliance on the plain language of the citizen suit provision of section 7002(a)(1)(B) of RCRA also destroys Petitioners' argument that the decision below is inconsistent with Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981). The questions addressed in Sea Clammers were "whether the FWPCA [Federal Water Pollution Control Act] and MPRSA [Marine Protection, Research and Sanctuaries Act] imply a private right of action independent of their citizen suit provisions" and "whether all federal common-law nuisance actions concerning ocean pollution now are pre-empted by the legislative scheme contained in the FWPCA and MPRSA." Id. at 10-11. The Ninth Circuit, of course, neither implied a private right of action independent of RCRA's citizen suit provision nor relied upon federal common law. Instead, it concluded that the RCRA citizen suit provision itself authorizes the award of equitable restitution and did so by relying on language that Petitioners concede has no counterpart in the FWPCA or MPRSA. Petition at 16. See Federal Water Pollution Control Act, 33 U.S.C. section 1365(a); Marine Protection, Research and Sanctuaries Act, 33 U.S.C. section 1415(g). Accordingly, the decision below is in no way inconsistent with Sea Clammers.[4]

Petitioners' argument that ordering equitable restitution by responsible parties is somehow the impermissible award of money damages is also without merit. First, as indicated above, nothing in the broad grant of authority set forth in RCRA section 7002(a) suggests that remedies are precluded if they can somehow be analogized to awards of money damages. Courts have issued mandatory injunctions requiring the payment of money on

---

[4] Because Congress expressly granted a right of action to private parties through the citizen suit provision of RCRA, the petitioners' discussion of Cort v. Ash, 422 U.S. 66 (1975), is also irrelevant.

numerous occasions. See United States v. Price, 688 F.2d 204, 213 (3d Cir. 1982), citing Crawford v. University of North Carolina, 440 F. Supp. 1047 (M.D.N.C. 1977); C.B.S., Inc. v. ASCAP, 320 F. Supp. 389, 392 (S.D.N.Y. 1970); United States v. Whiting Milk Co., 21 F. Supp. 321 (D. Mass. 1937), aff'd sub nom., H.P Hood & Sons, Inc. v. United States, 97 F.2d 677 (1st Cir. 1938), aff'd, 307 U.S. 588 (1939). See also Lincoln Properties, Ltd. v. Higgins, 24 Env't.L.Rep. 10491 (E.D. Cal. 1993). Second, the Eighth Circuit Court of Appeals and every district court that has addressed the issue has held that a claim for recovery of response costs under CERCLA, an environmental statute like RCRA, is not an action at law for money damages but is instead an equitable action. See United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 749 (8th Cir. 1986) (holding that when the government seeks response costs it is "seeking equitable relief in the form of restitution or reimbursement of the costs it expended in order to respond to the health and environmental danger presented by hazardous substances"). See also Hatco Corp. v. W.R. Grace & Co.–Conn., 859 F. Supp. 769, 774 (D.N.J. 1994), Thaler v. PRB Metal Products, Inc., 810 F. Supp. 49, 50 (E.D.N.Y. 1993) (both cases applying the Northeastern rule to actions between private parties). See also United States v. Mottolo, 605 F. Supp. 898, 912-13 (D.N.H. 1985) (citing seven cases that characterize recovery of response costs under CERCLA as equitable relief). As stated by the Fourth Circuit:

> "[A] person obtains restitution when he is restored to the position he formerly occupied either by the return of something which he formerly had or by the receipt of its equivalent in money." Damages on the other hand, are determined by reference to the loss sustained by a victim as a result of wrongful conduct on the part of another.

United States v. Long, 537 F.2d 1151, 1153-54 (4th Cir. 1975), cert. denied, 429 U.S. 871 (1976) (quoting Restatement of Restitution section 1, cmt. s, at 12 (1937)). See United States v. Valentine, 856 F. Supp. 627, 636 (D. Wyo. 1994) (holding that "contribution qualifies as a form of affirmative equitable relief that would help eliminate the risks posed by toxic wastes").

Accordingly, the Ninth Circuit's determination that RCRA's citizen suit provision authorizes an award of restitution is correct.

B. Analysis of RCRA Section 7002(a) in Relation to RCRA Section 7003 Confirms That Private Parties Are Entitled to Restitution of Their Response Costs.

In concluding that RCRA section 7002(a) authorizes restitution orders in cases brought by private parties, the Ninth Circuit relied on cases interpreting RCRA section 7003, codified at 42 U.S.C. section 6973, which authorizes suits by the Administrator of the United States Environmental Protection Agency (EPA). The Ninth Circuit's analysis in this regard is so compelling that Petitioners do not even attempt to rebut it.

As the Ninth Circuit pointed out, the language permitting citizen suits in RCRA section 7002 is "substantially identical" or "virtually identical" to the language in RCRA section 7003 authorizing the EPA to bring suit. KFC Western, Inc. v. Meghrig, 49 F.3d 518, 522-23 (9th Cir. 1995). In particular, both sections expressly permit the district courts to order responsible persons "to take such other action as may be necessary." 42 U.S.C. sections 6972 and 6973. The congruence of statutory language is no accident: in amending the citizen suit provision in 1984 to authorize district courts "to take such other action as may be necessary," Congress intended that the new version of section 7002

confer upon private parties the right to bring actions "pursuant to the standards of liability established under section 7003." H.R. Rep. No. 198, 98th Cong., 2d Sess., Pt. I, 53 (1983), reprinted in 1984 U.S.C.C.A.N. 5576, 5612. The Senate report contains similar language:

> These amendments are intended to allow citizens exactly the same broad substantive and procedural claim for relief which is already available to the United State [sic] under section 7003 [citation omitted]. Any differences in language between these amendments and 7003 are not intended to reflect a difference in the claims, but merely clarify that citizens will have the same claim presently available to the United States.

S. Rep. No. 284, 98th Cong., 1st Sess., at 56-57 (1983); cf. 1984 U.S.C.C.A.N. 5576, 5612.[5] Accordingly, as the Ninth Circuit recognized, there is "no principled reason to distinguish between the relief available to the Administrator and that available to private plaintiffs under the virtually identical provisions." KFC Western, Inc. v. Meghrig, 49 F.3d 518, 523 (9th Cir. 1995). See Middlesex County Bd. of Chosen Freeholders v. N.J., 645 F. Supp. 715, 721 (D.N.J. 1986). Petitioners do not and cannot argue to the contrary. Indeed, even the dissenting opinion below recognized that section 7002(a) and section 7003 should be interpreted consistently. Id. at 524 n.1 (Brunetti, J., dissenting).

As the Ninth Circuit recognized, both the Third and Eighth Circuits have held that the EPA is entitled to restitution of its response costs when it brings an action under section 7003. United

---

[5] See also Robertson, supra, note 3, 25 Env't.L.Rep. 10491, 10492-93.

States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1383 (8th Cir. 1989); United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 750 (8th Cir. 1986); United States v. Price, 688 F.2d 204, 214 (3d Cir. 1982). Accord, United States v. Conservation Chem. Co., 619 F. Supp. 162, 201 (W.D. Mo. 1985).[6] Because there can be "no principled reason" to distinguish these holdings from the holding below, Petitioners would have to argue that four separate decisions by three separate circuit courts are wrong. Yet Petitioners do not even cite the Northeastern Pharmaceutical & Chem. Co. and Price cases, and do not criticize or discuss the Aceto case (except to conjecture that the Eighth Circuit will ignore or distinguish it). Thus they cannot make this showing.

Accordingly, the decisions interpreting RCRA section 7003 provide additional persuasive support for the decision below.

II

THE NINTH CIRCUIT CORRECTLY DETERMINED THAT KFC SATISFIED THE "IMMINENT AND SUBSTANTIAL ENDANGERMENT" REQUIREMENT

Petitioners contend that RCRA's citizen suit provision may never be used where the imminent and substantial endangerment presented by the disposal of wastes has been remedied before suit is filed. Petitioners argue that the Ninth Circuit's contrary holding is barred by this Court's decision in Gwaltney v. Chesapeake Bay Found., 484 U.S. 49, 52, 67 (1987), which held that citizen suits may not be brought for "wholly past violations" of the Clean Water

---

[6] See also Robertson, supra, note 3, 25 Env't.L.Rep 10491, 10492-93.

Act (CWA), formerly known as the Federal Water Pollution Control Act (FWPCA). This argument is specious.

First, unlike the CWA/FWPCA provision, the RCRA citizen suit provision expressly allows suits concerning past conduct. Indeed, Gwaltney itself specifically cited section 7002(a)(1)(b) of RCRA for the proposition that "Congress has demonstrated in yet other statutory provisions that it knows how to avoid this prospective implication by using language that explicitly targets wholly past violations." Gwaltney v. Chesapeake Bay Found., 484 U.S. 49, 52 (1987). Petitioners attempt to rely upon Gwaltney for the proposition that "wholly past harms" (which, of course, cannot be meaningfully distinguished from "wholly past violations") are not redressable under RCRA is little short of breathtaking.

Second, as noted above with respect to Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981), the citizen suit provision of the CWA/FWPCA does not contain the critical language allowing a court to order "such other action as may be necessary." Accordingly, Gwaltney, like Sea Clammers, cannot be relied on to dictate a limiting construction of that language. Contrary to Petitioners' assertions, the statutory language actually used in RCRA does matter, and the significant differences between this language and the provisions of other environmental statutes precludes an attempt to fabricate an overarching "history" or "purpose" of citizen suits (Petition at 13-14, 28) that overrides the express statutory text.

Both the Eighth and the Ninth Circuits have concluded that the "imminent and substantial endangerment" language limits the sites as to which a RCRA action can be filed, not the time at which such an action should be filed. KFC Western, Inc. v. Meghrig, 49 F.3d 518, 521 (9th Cir. 1995); United States v. Aceto Agric.

Chems. Corp., 872 F.2d 1373, 1383 (8th Cir. 1989). Petitioners do not cite a single authority to the contrary; instead, they rely solely on Gwaltney for their argument that a RCRA suit is barred when the imminent and substantial endangerment has been addressed before suit is filed. Because there is no dispute here that the site has posed an "imminent and substantial endangerment," RCRA was appropriately utilized with respect to the contamination at the site.

As the Ninth Circuit recognized, adopting Petitioners' position in this regard would be "unfair and poor public pol[illegible]" KFC Western, Inc. v. Meghrig, 49 F.3d 518, 523 (9th Cir. 1995). Those parties that act promptly to address dangerous contamination will be deprived of their RCRA remedy while those who choose to do nothing, or to litigate rather than remediate, will have that remedy preserved. See Bayless Investment & Trading Co. v. Chevron U.S.A., 39 Env't Rep. Cas. (BNA) 1428, 1432 (D. Ariz. 1994). In short, Petitioners "would foreclose a RCRA remedy for the innocent buyers who clean up contaminated property." KFC Western, Inc. v. Meghrig, 49 F.3d 518, 524 (9th Cir. 1995). They would also eliminate vital incentives for parties to engage in cleanup activity. Recognizing a cause of action for restitution following cleanup is the only way of implementing Congress's intent "to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risks poses by toxic wastes." United States v. Price, 688 F.2d 204, 214 (3d Cir. 1982).

CONCLUSION

For all these reasons, the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case should be denied.

DATED: August 23, 1995

William N. Kammer

WILLIAM N. KAMMER
COUNSEL OF RECORD
GRAY CARY WARE & FREIDENRICH
A Professional Corporation
401 B Street, Suite 1700
San Diego, California 92101
619-699-2711

COUNSEL FOR KAUFMAN AND BROAD HOME CORPORATION AND KAUFMAN AND BROAD - SOUTH BAY, INC.

APPENDIX A

McCLINTOCK | WESTON
BENSHOOF | ROCHEFORT
RUBALCAVA | MacCUISH
ATTORNEYS AT LAW

August 11, 1995

VIA FEDERAL EXPRESS

Chulho Song
Gray, Cary, Ware & Freidenrich
101 B Street, Suite 1700
San Diego, CA 92101-4297

Re: Alan and Margaret Meghrigs v. KFC Western, Inc.

Dear Mr. Song:

In response to your request, petitioners Alan and Margaret Meghrig consent to the filing of an amicus curiae brief by Kaufman & Broad Home Corporation and Kaufman & Broad South Bay, Inc. in opposition to the Petition for Writ of Certiorari.

Very truly yours,

John P. Zaimes
McCLINTOCK, WESTON, BENSHOOF,
ROCHEFORT, RUBALCAVA & MacCUISH

11998 444 South Flower Street Forty Third Floor Los Angeles California 90071 Telephone 213 623 2322 Facsimile 213 623 0824

APPENDIX A

DANIEL ROMANO
Attorney At Law
100 Wilshire Boulevard, Suite 1300
Santa Monica, California 90401
(310) 451-4959 - Office
(310) 260-5090 - Telecopy

August 9, 1995

William N. Kammer, Esq.
Gray Cary Ware & Freidenrich
401 B Street, Suite 1700
San Diego, CA 91201-4297

Re: Consent to Filing Of An Amicus Brief

Dear Mr. Kammer:

On behalf of KFC Western, Inc., I hereby consent to the filing of an amicus curiae brief by Kaufman and Broad Home Corporation, by and through its counsel of record, in opposition to the Petition for Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit, petitioned to the United States Supreme Court, October Term, 1995, by Petitioners Alan Meghrig and Margaret Meghrig. This letter is intended to satisfy the consent requirements of Rule 37 of the Supreme Court.

Very Truly Yours,

Daniel Romano

DR:lrc

William N. Kammer BAR #: 53848
GRAY CARY WARE & FREIDENRICH
A Professional Corporation
401 B Street, Suite 1700
San Diego, CA 92101
619-699-2711

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

ALAN MEGHRIG and MARGARET MEGHRIG, Petitioners, vs. KFC WESTERN, INC. Respondent.	CASE NO. 95-83 DECLARATION OF SERVICE Person served: See Below Date Served: August 24, 1995

I, the undersigned, declare under penalty of perjury that I am over the age of eighteen years and not a party to this action; that I served the person(s) named below the following documents: **BRIEF OF KAUFMAN AND BROAD HOME CORPORATION AND KAUFMAN AND BROAD - SOUTH BAY, INC. AS AMICI CURIAE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

in the following manner: (check one)

1) ☐ By personally delivering copies to the person served.

2) ☐ By leaving, during usual office hours, copies in the office of the person served with the person who apparently was in charge and thereafter mailing (by first-class mail, postage prepaid) copies to the person served at the place where the copies were left.

3) ☐ By leaving copies at the dwelling house, usual place of abode, or usual place of business of the person served in the presence of a competent member of the household or a person apparently in charge of his office or place

of business, at least 18 years of age, who was informed of the general nature of the papers, and thereafter mailing (by first-class mail, postage prepaid) copies to the person served at the place where the copies were left.

4) ■ By placing a copy in a separate envelope, with postage fully prepaid, for each addressee named below and depositing each in the U.S. Mail at San Diego, California, for delivery, by First Class Mail, CERTIFIED MAIL, on August 24, 1995.

Executed on August 24, 1995 at San Diego, California.

Connie Garner

PERSONS SERVED

Daniel Romano, Esq.
100 Wilshire Boulevard, Suite 1300
Santa Monica, CA 90401
(310) 451-4959

John P. Zaimes, Esq.
Clifton J. McFarland, Esq.
McClintock, Weston, Benshoof, Rochefort,
Rubalcava & MacCuish
444 South Flower Street, 43rd Floor
Los Angeles, CA 90071
(213) 623-2322

Clerk of the United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543

Supreme Court, U.S.
FILED
NOV 9 1995
CLERK

(16)

No. 95-83

In The

Supreme Court of the United States

October Term, 1995

ALAN MEGHRIG AND MARGARET MEGHRIG,

Petitioners,

vs.

KFC WESTERN, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

DANIEL ROMANO
100 Wilshire Blvd.
Suite 1300
Santa Monica, CA 90401
(310) 451-4959
Counsel for Respondent

JOHN P. ZAIMES
CLIFTON J. MCFARLAND
MCCLINTOCK, WESTON,
BENSHOOF, ROCHEFORT,
RUBALCAVA & MACCUISH
444 South Flower St., 43rd Fl.
Los Angeles, California 90071
(213) 623-2322
Counsel for Petitioners

Petition For Certiorari Filed July 13, 1995
Certiorari Granted September 27, 1995

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

33 pp

TABLE OF CONTENTS

Page

Relevant Docket Entries 1

Complaint in the United States District Court For Cost Recovery, Contribution and Indemnity Under RCRA, May 29, 1992 5

Order of the United States District Court for the Central District of California, September 21, 1992 ..... Pet App A-24

First Amended Complaint in the United States District Court for Equitable Restitution Under RCRA § 7002, 42 U.S.C. § 6972(a)(1)(b), October 1, 1992 12

Order of the United States District Court for the Central District of California Dismissing Action, November 10, 1992 ..... Pet App A-21

Order of the United States District Court of Appeals for the Ninth Circuit, March 1, 1995 ..... Pet App A-1

Order of the United States District Court of Appeals for the Ninth Circuit, April 14, 1995 ..... Pet App A-26

Order of the United States Supreme Court Granting Petition for Writ of Certiorari, September 27, 1995 21

Defendants' Memorandum of Points and Authorities in Opposition to Motion to Dismiss Action in United States District Court Without Prejudice; Request for Imposition of Attorneys Fees as Condition of Dismissal or, in the Alternative, Request for Stay; Declaration of Stephanie Nigohosian, October 5, 1995 22

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
05/29/92	Complaint for Cost Recovery, Contribution and Indemnity under RCRA
08/04/92	Meghrigs' Notice of Pendency of Related Action
08/05/92	Notice of Margaret and Alan Meghrigs' Acknowledgment of Receipt of Summons and Complaint
08/10/92	Meghrigs' Notice of Motion and Motion to Dismiss Complaint
08/10/92	Meghrigs' Memorandum of Points and Authorities in Support of Motion to Dismiss Complaint
09/04/92	KFC Western's Opposition to Meghrigs' Motion to Dismiss Complaint
09/14/92	Meghrigs' Reply in Support of Motion to Dismiss Complaint
09/21/92	Civil Minutes – Order Granting Meghrigs' Motion to Dismiss with 10 Days Leave to Amend
10/01/92	KFC Western's First Amended Complaint
10/14/92	Meghrigs' Notice of Motion and Motion to Dismiss First Amended Complaint
10/14/92	Meghrigs' Memorandum of Points and Authorities In Support of Motion to Dismiss First Amended Complaint
10/15/92	Proof of Service of First Amended Complaint by Mail on Environmental Protection Agency

10/15/92	Proof of Service of First Amended Complaint by Mail on Attorney General of the United States, U.S. Department of Justice
10/26/92	KFC Western's Opposition to Meghrigs' Motion to Dismiss First Amended Complaint
11/02/92	Meghrigs' Reply in Support of Motion to Dismiss First Amended Complaint
11/05/92	KFC Western's Notice of Errata to Opposition to Motion to Dismiss First Amended Complaint
11/10/92	Civil Minutes – Order Granting Motion to Dismiss Without Leave to Amend
11/10/92	Order Dismissing Action In It's Entirety Without Prejudice
12/09/92	KFC Western's Notice of Appeal from the Court's Final Judgment Entered 11/10/92
12/15/92	KFC Western's Transcript Designation and Ordering Form
12/18/92	Appellant's Civil Appeals Docketing Statement
12/18/92	Meghrigs' Transcript Designation and Ordering Form
12/18/92	United States Court of Appeals for the Ninth Circuit Time Schedule Order
12/23/92	Meghrigs' Amended Transcript Designation and Ordering Form
12/31/92	Appellees' Response to Appellant's Civil Appeals Docketing Statement
04/12/93	Joint Stipulation re Stay of Appeal Pending Disposition of State Action

04/20/93	United States Court of Appeals for the Ninth Circuit Order Denying Joint Stipulation for Stay
05/03/93	Excerpt of Record
05/06/93	Appellant's Opening Brief
06/10/93	Appellees' Brief
06/18/93	Certificate of Record
06/23/93	Appellant's Reply Brief
03/01/95	United States Court of Appeals for the Ninth Circuit Opinion Reversing and Remanding the Judgment of the United States District Court
03/15/95	Appellees' Petition for Rehearing with Suggestion for Rehearing En Banc
04/14/95	United States Court of Appeals for the Ninth Circuit Order Denying Petition for Rehearing
06/07/95	Civil Minutes – Mandate of Court of Appeals is Filed and Spread upon the Record
06/29/95	Meghrigs' Answer to First Amended Complaint
07/05/95	Order re Early Meeting of Counsel and Mandatory Status Conference
08/17/95	Stipulation to Continue Mandatory Status Conference and Order Thereon
09/15/95	KFC Western's Report of Early Meeting of Counsel
09/15/95	Meghrigs' Report re Early Meeting of Counsel

09/15/95	KFC Western's Notice of Motion and Motion for Order Dismissing Action Without Prejudice; Memorandum of Points and Authorities
09/15/95	KFC Western's [Proposed] Order Granting Motion to Dismiss Action Without Prejudice
09/20/95	Civil Minutes – Order Continuing Mandatory Status Conference; Order to Show Cause re Lack of Prosecution and Sanctions
10/02/95	Declaration of Daniel Romano re Order to Show Cause for Failure to Prosecute
10/05/95	Meghrigs' Memorandum of Points and Authorities in Opposition to Motion to Dismiss Without Prejudice; Request for Imposition of Attorneys' Fees as Condition of Dismissal or, In The Alternative, Request for Stay; Declaration of Stephanie A. Nigohosian
10/06/95	Declaration of John P. Zaimes re Order to Show Cause for KFC Western's Failure to Prosecute
10/10/95	KFC Western's Objections to Declaration of Stephanie A. Nigohosian and Certain Exhibits Attached Thereto
10/10/95	KFC Western's Reply Memorandum of Points and Authorities in Support of Motion for Order Dismissing Action Without Prejudice; Supplemental Declaration of Daniel Romano
10/10/95	Civil Minutes – Placing Motion to Dismiss Off Calender Pending Decision by United States Supreme Court

DANIEL ROMANO, Bar No. 117704
100 Wilshire Boulevard, Suite 1300
Santa Monica, CA 90401
(310) 451-4959

Attorneys for Plaintiff
KFC Western Inc.

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

KFC WESTERN, INC., Plaintiff, v. ALAN MEGHRIG and MARGARET MEGHRIG and DOES 1-10, Defendants.	CASE NO. 92 3269 HLH(SX) COMPLAINT FOR COST RECOVERY, CONTRIBUTION AND INDEMNITY UNDER RCRA

Plaintiff KFC Western, Inc. ("KFC") alleges as follows:

INTRODUCTION

1. This action arises from the sale of certain real property by defendants Alan Meghrig and Margaret Meghrig (collectively the "Meghrigs" or "defendants") to plaintiff. The property consists of a parcel of land located at 340 North Western Avenue, Los Angeles, California ("property"). Plaintiff is informed and believes, and upon such informaiton and belief alleges, that the property had

been the site of a gasoline station which also contained at least one petroleum underground storage tank.

2. Defendant sold the property on September of 1975 to plaintiff. Plaintiff is the present owner of the property, and at all times relevant herein has operated a Kentucky Fried Chicken franchise on the property.

3. On or about October 1988, while performing various tasks pertaining to construction and grading at the property, plaintiff, thrugh its engineer, discovered contaminated soil at the property. Thereafter, on October 26, 1988, the City of Los Angeles, Department of Building and Safety issued a Corrective Notice, ordering that all construction at the property stop pending analysis of the contaminated soils, and obtaining a clearance from the County of Los Angeles Department of Health Services ("DHS") pertaining to the cleanup of the contaminated soils.

4. Subsequently, pursuant to the order by the City of Los Angeles, plaintiff retained a consultant to perform the necessary remedial work. Following his investigation, plaintiff's consultant concluded that the property had, among others, elevated Total Petroleum Hydrocarbons ("TPH") requring excavation of the heavily contaminated soil for removal off-site and recycling of other contaminated soil. Plaintiff's consultant also concluded that the contamination at the property was the result of release of petroleum products from the operation of the gasoline station and/or leakage from underground tanks containing petroleum at the property prior to plaintiff's ownership of the property.

5. The cleanup and removal of the contaminated soil was performed in conjunction with the DHS. Remediation of the property was completed and the subject site has met closure status within a period less than three years from the date of this Complaint.

6. Plaintiff acquired the property with no knowledge of the presence of contaminated soil at the property, and the release of TPH which gave rise to plaintiff's cleanup activities pursuant to governmental directives. In acquiring the property, plaintiff reasonably believed that the property was fully in conformance with all applicable laws, ordinances, orders, and regulations at the time of the conveyance. As alleged below, at no time did the defendants inform plaintiff of the presence of contaminated soil on the property, notwithstanding that defendants knew, or should have known that such materials were present in the soils at the property.

7. In taking all necessary steps to clean up the property, including the costs of investigation, correcting and otherwise complying with the government orders, plaintiff expended significant sums of money totaling at least $211,296.23. In addition, plaintiff incurred, and continues to incur, additional costs and expenses as a result of the disposal of the contaminated soil off site. Plaintiff brings this action against defendants to recover the costs incurred in remedying the contaminated soil conditions, bringing the property into conformance with all applicable rules, regulations, and statutes, and disposing of the contaminated soil off site.

JURISDICTION

8. This action is brought pursuant to Section 7002 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. Section 6972. This Court has jurisdiction of this action pursuant to 42 U.S.C. Section 6972(a)(1)(B); 28 U.S.C. Sections 1331 and 1367.

VENUE

9. The claims asserted in this action arose within this District. Venue of this action is proper pursuant to 42 U.S.C. Section 6972(a).

GENERAL ALLEGATIONS

10. At all times herein mentioned and presently, KFC Western is a California corporation duly organized to conduct business in the State of California.

11. Plaintiff is informed and believes, and upon such information and belief alleges, that at all times herein mentioned defendants have been and now are residents of the State of California.

12. Plaintiff is unaware of the names and capacities of the defendants named fictitiously herein as Does 1 through 10. Plaintiff will amend this complaint to allege such names and capacities when the same are ascertained. Plaintiff is informed and believes, and thereupon alleges, that each of said defendants, Does 1 through 10, is legally responsible for the damages alleged in this complaint.

13. Plaintiff is informed and believes and, upon such information and belief alleges, that defendants and Does 1 through 10, and each of them, were at all times herein mentioned the agents and/or employees of each and every other defendant and were at all times mentioned herein acting within the purpose and scope of said agency and/or employment, and were acting with the authorization and ratification of each of the remaining defendants.

14. Plaintiff is informed and believes, and alleges on that basis, that defendants negligently handled, stored, treated, disposed, discharged and otherwise carelessly managed the gasoline station and petroleum on the property, resulting in the contamination of the soils, as described in paragraph 4 above.

15. On or about October 22, 1975, defendants conveyed the property to plaintiff KFC Western for a total purchase price of $152,000.00.

16. By way of a letter dated June 29, 1990, plaintiff informed defendants of the presence of contaminated soils at the property, and plaintiff's clean-up activities in connection thereto, and sought reimbursement of all costs associated with plaintiff's remedial efforts on the property. As of the date of this filing, defendants have failed to acknowledge their responsibility for the costs incurred by plaintiff to respond to the presence of contaminated soils on the property, and to the release and threatened release of the substances which defendants deposited and then abandoned there.

17. Prior to the filing of this action, plaintiff sent a letter to the Administrator of the U.S. EPA notifying him,

under 42 U.S.C. Section 6972(b)(1), of plaintiff's intent to pursue legal action against Defendants within the appropriate statutory period to recover its clean up costs. Copies of the letter were sent to Defendants and to the California DHS. The EPA and DHS did not respond to the letter, and, to the best of plaintiff's knowledge, took no legal action against defendants and incurred no costs to initiate a remedial investigation and feasibility study on the property.

18. As of the date of this filing, plaintiff has absorbed entirely these costs.

FIRST CAUSE OF ACTION

(RCRA)

19. Plaintiff incorporates by reference the allegations contained in paragraphs 1-18, as though fully set forth herein.

20. Plaintiff is informed and believes, and on that basis alleges, that defendants contributed to the past handling, storage, treatment or disposal of a solid waste at the Property, as those terms are defined in 42 U.S.C. Section 6903.

21. Plaintiff is informed and believes, and on that basis alleges, that the contaminated soil at the Property contained "solid waste" as that term is defined in 42 U.S.C. Section 6903(27).

22. Plaintiff is informed and believes, and on that basis alleges, that the activities of the defendants, and each of them, may have presented an imminent and substantial endangerment to health and the environment.

23. Defendants' conduct constitute a violation of RCRA, and as a direct and proximate result thereof, Plaintiff has suffered economic detriment as more specifically alleged below. Accordingly, Plaintiff is entitled to restitution of the costs it expended to clean up the Property.

DAMAGES

24. Plaintiff, the present owner of the property, has incurred substantial costs associated with investigating the degree and extent of soil contamination at the property, as well as in taking appropriate remedial or removal action to clean up the contaminated property, totaling at least $211,296.23.

In addition, plaintiff incurs, and continues to incur, substantial costs and damages associated with the off-site disposal of the contaminated soil.

WHEREFORE, plaintiff prays for judgment against defendants as follows:

1. For general damages according to proof, but believed to exceed $211,296.23;

2. For general and special damages according to proof associated with the off-site disposal of the contaminated soil by plaintiff;

3. For attorney fees and costs of suit herein; and

4. For such other and further relief as the court may deem just and proper.

Dated: May 29, 1992

/s/ Daniel Romano
Daniel Romano
Attorneys for Plaintiff
KFC Western, Inc.

DANIEL ROMANO, Bar No. 117704
100 Wilshire Boulevard
Suite 1300
Santa Monica, California 90401
310/451-4959

Attorneys for Plaintiff
KFC Western, Inc.

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

KFC WESTERN, INC., Plaintiff, v. ALAN MEGHRIG and MARGARET MEGHRIG and DOES 1-10, Defendants.	Case No. CV-92 3269-HLH(Sx) **FIRST AMENDED COMPLAINT FOR EQUITABLE RESTITUTION UNDER RCRA SECTION 7002, 42 U.S.C. SECTION 6972(a)(1)(B)**

Plaintiff KFC Western, Inc. ("KFC") alleges as follows:

INTRODUCTION

1. This action arises from the sale of certain real property by Defendants Alan Meghrig and Margaret Meghrig (collectively the "Meghrigs" or "Defendants") to Plaintiff. The property consists of a parcel of land located at 340 North Western Avenue, Los Angeles, California ("property"). Plaintiff is informed and believes, and upon such information and belief alleges, that the property had

been the site of a gasoline station which also contained at least one petroleum underground storage tank.

2. Defendants sold the property on September of 1975 to Plaintiff. Plaintiff is the present owner of the property, and at all times relevant herein has operated a Kentucky Fried Chicken franchise on the property.

3. On or about October 1988, while performing various tasks pertaining to construction and grading at the property, Plaintiff, through its engineer, discovered contaminated soil at the property. Thereafter, on October 26, 1988, the City of Los Angles, Department of Building and Safety, issued a Corrective Notice, ordering that all construction at the property stop pending analysis of the contaminated soils, and obtaining a clearance from the City of Los Angeles Department of Health Services ("DHS") pertaining to the cleanup of the contaminated soils.

4. Subsequently, pursuant to the order by the City of Los Angeles, Plaintiff retained a consultant to perform the necessary remedial work. Following his investigation, Plaintiff's consultant concluded that the property had, among others, elevated Total Petroleum Hydrocarbons ("TPH") requiring excavation of the heavily contaminated soil for removal off-site and recycling of other contaminated soil. Plaintiff's consultant also concluded that the contamination at the property was the result of release of petroleum products from the operation of the gasoline station and/or leakage from underground tanks containing petroleum at the property prior to Plaintiff's ownership of the property.

5. The cleanup and removal of the contaminated soil was performed in conjunction with the DHS. Remediation of the property was completed and the subject site has met closure status within a period less than three years from the date of this Complaint.

6. Plaintiff acquired the property with no knowledge of the presence of contaminated soil at the property, and the release of TPH which gave rise to Plaintiff's cleanup activities pursuant to governmental directives. In acquiring the property, Plaintiff reasonably believed that the property was fully in conformance with all applicable laws, ordinances, orders, and regulations at the time of the conveyance. At no time did the Defendants inform Plaintiff of the presence of contaminated soil on the property, notwithstanding that Defendants knew, or should have known that such materials were present in the soils at the property.

7. In taking all necessary steps to clean up the property, including the costs of investigation, correcting and otherwise complying with the government orders, Plaintiff expended significant sums of money totaling at least $211,296.23. In addition, Plaintiff incurred, and continues to incur, additional costs and expenses as a result of the disposal of the contaminated soil off site. Plaintiff brings this action against Defendants for equitable restitution of the costs incurred in remedying the contaminated soil conditions, bringing the property into conformance with all applicable rules, regulations, and statutes, and disposing of the contaminated soil off site.

JURISDICTION

8. This action is brought pursuant to Section 7002 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. Section 6972(a)(1)(B). This Court has jurisdiction of this action pursuant to 42 U.S.C. Section 9072(a)(1)(B); 28 U.S.C. Sections 1331 and 1367.

VENUE

9. The claims asserted in this action arise within this District. Venue of this action is proper pursuant to 42 U.S.C. Section 6972(a).

GENERAL ALLEGATIONS

10. At all times herein mentioned and presently, KFC Western is a California corporation duly organized to conduct business in the State of California.

11. Plaintiff is informed and believes, and upon such information and belief alleges, that at all times herein mentioned Defendants have been and are now residents of the State of California.

12. Plaintiff is unaware of the names and capacities of the Defendants named fictitiously herein as Does 1 through 10. Plaintiff will amend this Complaint to allege such names and capacities when the same are ascertained. Plaintiff is informed and believes, and thereupon alleges, that each of said Defendants, Does 1 through 10, is legally responsible for the damages alleged in this Complaint.

13. Plaintiff is informed and believes and, upon such information and belief alleges, that Defendants and Does 1 through 10, and each of them, were at all times herein mentioned the agents and/or employees of each and every other Defendant and were at all times mentioned herein acting within the purpose and scope of said agency and/or employment, and were acting with the authorization and ratification of each of the remaining Defendants.

14. Plaintiff is informed and believes, and alleges on that basis, that Defendants negligently handled, stored, treated, disposed, discharged and otherwise carelessly managed the gasoline station and petroleum on the property, resulting in the contamination of the soils, as described in paragraph 4, above.

15. On or about October 22, 1975, Defendants conveyed the property to Plaintiff KFC Western for a total purchase price of $152,000.00.

16. By way of a letter dated June 29, 1990, Plaintiff informed Defendants of the presence of contaminated soils at the property, and Plaintiff's clean-up activities in connection thereto, and sought reimbursement of all costs associated with Plaintiff's remedial efforts on the property. As of the date of this filing, Defendants have failed to acknowledge their responsibility for the costs incurred by Plaintiff to respond to the presence of contaminated soils on the property, and to the release and threatened release of the substances which Defendants deposited and then abandoned there.

17. On or about October 1, 1990, more than ninety (90) days prior to the filing of this action, Plaintiff sent a

letter to the Administrator of the U.S. EPA notifying him of Plaintiff's intent to pursue legal action against Defendants within the appropriate statutory period to recover its clean up costs. Copies of the letter were sent to Defendants and to the California DHS. The EPA and DHS did not respond to the letter, and, to the best of Plaintiff's knowledge, took no legal action against Defendants and incurred no costs to initiate a remedial investigation and feasibility study on the property.

18. A copy of Plaintiff's First Amended Complaint has been served on the Attorney General of the United States in conformance with 42 U.S.C. § 6972(b)(2)(F).

19. As of the date of this filing, Plaintiff has absorbed entirely these costs.

FIRST CAUSE OF ACTION

(For Equitable Restitution Under RCRA Section 7002(a)(1)(B))

20. Plaintiff incorporates by reference the allegations contained in paragraphs 1-19, as though fully set forth herein.

21. Plaintiff is informed and believes, and on that basis alleges, that Defendants contributed to the past handling, storage, treatment or disposal of a solid waste at the property, as those terms are defined in 42 U.S.C. Section 6903.

22. Plaintiff is informed and believes, and on that basis alleges, that the contaminated soil at the property contained "solid waste" as that term is defined in 42 U.S.C. Section 6903(27).

23. Plaintiff is informed and believes, and on that basis alleges, that as a result of the activities of the Defendants, and each of them, the contamination at the property may have presented an imminent and substantial endangerment to health and the environment by, among other things, threatening the groundwater in the area and potentially risking the health of patrons and the public expected to use the property and the KFC franchise thereon. This endangerment stems from the handling, storage, treatment or disposal of solid waste by Defendants at the property.

24. Defendants' conduct constitutes a violation of RCRA, and as a direct and proximate result thereof, Plaintiff has suffered economic detriment as more specifically alleged below. Accordingly, Plaintiff is entitled to equitable restitution of the costs it expended to clean up the property under 42 U.S.C. Section 6972(a).

25. Plaintiff, the present owner of the property, has incurred substantial costs associated with investigating the degree and extent of soil contamination at the property, as well as in taking appropriate remedial or removal action to clean up the contaminated property, totaling at least $211,296.23.

In addition, Plaintiff incurs, and continues to incur, substantial costs and damages associated with the off-site disposal of the contaminated soil.

WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

1. For equitable restitution of the environmental clean up costs expended by it according to proof, but believed to exceed $211,296.23;

2. For restitution of other costs according to proof associated with the off-site disposal of the contaminated soil by Plaintiff;

3. For attorney fees and costs of suit herein; and

4. For such other and further relief as the Court may deem just and proper.

Dated: October 1, 1992

By /s/ Daniel Romano
Daniel Romano
Attorneys for Plaintiff
KFC Western, Inc.

PROOF OF SERVICE BY MAIL

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to the within action. My business address is 100 Wilshire Blvd, Suite 1300, Santa Monica, CA 90401.

On October 1, 1992, I served the foregoing document, described as **FIRST AMENDED COMPLAINT FOR EQUITABLE RESTITUTION UNDER RCRA SECTION 7002, 42 U.S.C. SECTION 6972(a)(1)(B)** on the parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage fully prepaid in the United States Mail at Santa Monica, California, addressed as follows:

John P. Zaimes, Esq.
McClintock, Weston, Benshoof,
Rochefort, Rubalcava & MacCuish
444 South Flower Street, Forty Third Floor
Los Angeles, CA 90071

Lourdes Baird
United States Attorney
312 North Spring Street
Los Angeles, CA 90012

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

EXECUTED this 1st day of October, 1992 at Santa Monica, California.

/s/ Trudy Berg
Trudy Berg

SUPREME COURT OF THE UNITED STATES

No. 95-83

Alan Meghrig, et ux.,

Petitioners

v.

KEC [sic] Western, Inc.

ORDER ALLOWING CERTIORARI.
Filed September 27, 1995.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 9, 1995. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 8, 1995. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 28, 1995. Rule 29.2 does not apply.

September 27, 1995

JOHN P. ZAIMES (Bar No. 091933)
TERI L. BREUER (Bar No. 162557)
McCLINTOCK, WESTON, BENSHOOF, ROCHEFORT, RUBALCAVA & MacCUISH
444 South Flower Street, Forty-Third Floor
Los Angeles, California 90071-2901
Telephone: (213) 623-2322

Attorneys for Defendants
ALAN MEGHRIG and MARGARET MEGHRIG

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

KFC WESTERN, INC., Plaintiff, vs. ALAN MEGHRIG and MARGARET MEGHRIG and DOES 1-10, Defendants.	Case No. CV-92 3269-HLH (Sx) Date: October 16, 1995 Time: 10:00 a.m. Courtroom of the Honorable Harry L. Hupp

(Filed Oct. 2, 1995)

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS WITHOUT PREJUDICE; REQUEST FOR IMPOSITION OF ATTORNEYS FEES AS CONDITION OF DISMISSAL OR, IN THE ALTERNATIVE, REQUEST FOR STAY; DECLARATION OF STEPHANIE A. NIGOHOSIAN

• • •

EXHIBIT A

JOHN P. ZAIMES (Bar No. 091933)
McCLINTOCK, WESTON, BENSHOOF, ROCHEFORT, RUBALCAVA & MacCUISH
444 South Flower Street, Forty-Third Floor
Los Angeles, California 90071-2901
Telephone: (213) 623-2322

Attorneys for Defendants
ALAN MEGHRIG and MARGARET MEGHRIG

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

KFC WESTERN, INC., Plaintiff, vs. ALAN MEGHRIG and MARGARET MEGHRIG) and DOES 1-10, Defendants.	CASE NO. BC 043874 AMENDED ORDER WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Aug. 21, 1995)

PLEASE TAKE NOTICE that the Motion for Summary Judgment of Defendants Alan Meghrig and Margaret Meghrig (the "Meghrigs") in the above-captioned matter came on regularly for hearing at 8:30 a.m. on July 11, 1995 before the Honorable Stephen E. O'Neil in Department 46 of the above-entitled Court. John P. Zaimes of McClintock, Weston, Benshoof, Rochefort, Rubalcava & MacCuish appeared on behalf of defendants and moving parties, the Meghrigs; Daniel Romano

appeared on behalf of plaintiff and responding party KFC Western, Inc.

After considering the papers filed in support of, and in opposition to, the Meghrigs' Motion for Summary Judgment, and the oral argument of counsel, the Court makes the following findings of facts and conclusions of law and grants summary judgment in favor of defendants.

FINDINGS OF FACT

1. Plaintiff is the owner of real property located at 340 North Western Avenue in Los Angeles, California (the "Subject Property"). (Defendants' Undisputed Fact No. 1.)

2. The Meghrigs took title to the Subject Property in March 1963. (Defendants' Undisputed Fact No. 2.)

3. The Meghrigs never owned a gasoline service station business on the Subject Property. (Defendants' Undisputed Fact No. 3; Defendants' Objections to Plaintiff's Response to Fact No. 3.)

4. The Meghrigs never operated a gasoline service station located on the Subject Property. (Defendants' Undisputed Fact No. 4.)

5. A service station did not operate on the Subject Property during the period of the Meghrigs' ownership. (Defendants' Undisputed Fact No. 5.)

6. The Meghrigs took no part in the management of the Subject Property during the 1960s. (Defendants' Undisputed Fact No. 6.)

7. The Meghrigs never undertook any acts which caused gasoline contamination on the Subject Property. (Defendants' Undisputed Fact No. 7.)

8. There was a gasoline service station on the Subject Property from 1917 until 1962, prior to the property's ownership of the Meghrigs. (Defendants' Undisputed Fact No. 8.)

9. Underground storage tanks on the Subject Property were replaced in 1951. (Defendants' Undisputed Fact No. 9.)

10. Underground storage tanks on the Subject Property were completely removed in December 1964. No tanks were placed on the Subject Property thereafter. (Defendants' Undisputed Fact No. 12.)

11. A strip mall was constructed on the Subject Property in 1965. Plaintiff leased a portion of the strip mall from the Meghrigs from May 1965 to the time the Subject Property was sold to plaintiff in 1975. (Defendants' Undisputed Fact No. 10.)

12. Plaintiff discovered the contamination on the Subject Property on or about October 26, 1988. (Defendants' Undisputed Fact No. 11.)

13. Plaintiff completed its cleanup of the Subject Property on or before March 12, 1989. (Defendants' Undisputed Fact No. 13.)

14. Plaintiff filed its initial complaint in this matter on December 9, 1991. (Defendants' Undisputed Fact No. 14.)

15. There is no evidence that plaintiff suffered any actual damage arising out of the contamination of groundwater after December 1, 1988. In fact, plaintiffs' own evidence shows that the groundwater beneath the Subject Property contained less than action level amounts of contaminants in 1988, and no groundwater cleanup was necessary. (Defendants' Undisputed Fact No. 15; Defendants' Objections to Plaintiffs' Response to Fact No. 15.)

16. There is no evidence that plaintiff suffered any actual damage arising out of soil contamination after December 1, 1988. In fact, plaintiffs' own evidence shows that the soil contamination at the Subject Property had naturally biodegraded over time and was decreasing during the 1980s. (Defendants' Undisputed Fact No. 16; Defendants' Objections to Plaintiffs' Response to Fact No. 16.)

17. There is no evidence that the Meghrigs had either actual or constructive knowledge of contamination on the Subject Property. (Defendants' Objections to Plaintiffs' Fact No. 17.)

CONCLUSIONS OF LAW

1. Having presented no evidence that the Meghrigs engaged in any acts, or tortiously omitted to undertake any act, which resulted in contamination of the Subject Property, plaintiff KFC Western, Inc.'s causes of action for continuing public nuisance, private nuisance and trespass fail as a matter of law. *Newhall Land & Farming v. Superior Court*, 19 Cal.App.4th 334, 345, 23 Cal.Rptr. 2d 377, 383 (1993); *RTC v. Rossmoor Corp.*, 34 Cal.App.4th 93 (1995);

Lussier v. San Lorenzo Valley Water District, 206 Cal.App.3d 92, 100, 253 Cal.Rptr. 470 (1988).

2. Having presented no evidence that it suffered any damage within the applicable three-year limitations period, plaintiff KFC Western, Inc.'s causes of action for continuing public nuisance, private nuisance and trespass fail as a matter of law. *Capogeannis v. Superior Court*, 12 Cal.App.4th 668, 676, 15 Cal.Rptr.2d 796 (1993).

3. The money expended by plaintiff to clean up the Subject Property does not constitute damage to the property arising out of nuisance or trespass. *CAMSI IV v. Hunter Technology Corporation*, 230 Cal.App.3d 1525, 282 Cal.Rptr. 80 (1991).

4. Civil Code Section 3483 does not provide a mechanism for a current owner of property to recover costs it expends in abating a nuisance on its property from the immediately preceding owner where the immediately preceding owner did not engage in any acts or omissions which resulted in the creation of the nuisance. *Leslie Salt Co. v. San Francisco Bay Cons. & Dev. Comm.*, 153 Cal.App.3d 605, 200 Cal.Rptr. 575 (1989); *People v. Southern Pacific Co.*, 150 Cal.App.2d Supp. 831, 311 P.2d 200 (1957).

5. To the extent that Civil Code Section 3483 may provide a mechanism for a current owner of property to recover its costs expended in abating a nuisance on its property from a prior owner, recovery may be had only if the prior owner knew of the existence of the nuisance. Since KFC has presented no competent evidence that the Meghrigs knew of the existence of contamination on the

Subject Property during their ownership, KFC's continuing public nuisance and private nuisance causes of action fail, as a matter of law. *Reinhard v. Lawrence Warehouse Co.*, 42 Cal.App.2d 741, 107 P.2d 501, (1940).

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that summary judgment is granted in favor of the Meghrigs and against plaintiff on the grounds that there is no triable issue of material fact with respect to the nuisance and trespass causes of action contained in plaintiff's complaint and that the Meghrigs are entitled to judgment as a matter of law.

DATED: AUG 21 1995

STEPHEN E. O'NEIL
JUDGE OF THE
SUPERIOR COURT

(PROOF OF SERVICE - 1013a, 2015.5 C.C.P.)

STATE OF CALIFORNIA]
] ss.
COUNTY OF LOS ANGELES]

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 444 South Flower Street, Forty-Third Floor, Los Angeles, California 90071.

On August 3, 1995, I served the foregoing document(s) described as **AMENDED ORDER WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Daniel Romano, Esq.
100 Wilshire Boulevard
Suite 1300
Santa Monica, California 90401

X I placed such envelope with postage thereon fully prepaid in the United States mail at Los Angeles, California.

X I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the

party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

_ I sent such document(s) by Federal Express/UPS Air.

_ I delivered such envelope by hand to the offices of the addressees.

X I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

_ I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on August 3, 1995, at Los Angeles, California.

/s/ Alicia D. Araneta
Alicia D. Araneta

EXHIBIT B

• • •

Supreme Court, U.S.
FILED
NOV 9 1995
CLERK

No. 95-83

In the Supreme Court of the United States

OCTOBER TERM, 1995

Alan Meghrig and Margaret Meghrig,
Petitioners,
vs.
KFC Western, Inc.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF FOR THE PETITIONERS

John P. Zaimes
Counsel of Record

Clifton J. McFarland
McCLINTOCK, WESTON,
BENSHOOF, ROCHEFORT,
RUBALCAVA & MacCUISH
444 South Flower Street, 43rd Floor
Los Angeles, California 90071
(213) 623-2322
Counsel for Petitioners

QUESTIONS PRESENTED

The citizen suit provision of the Resource Conservation and Recovery Act ("RCRA") gives federal district courts limited jurisdiction: (1) to "restrain" any person who has contributed or is contributing to the handling of a solid or hazardous waste which endangers human health or the environment and (2) to "order such person to take such other action as may be necessary." The Ninth Circuit Court of Appeals has held that this provision authorizes a citizen plaintiff to pursue a claim for reimbursement of past costs expended in cleaning up property contaminated with solid or hazardous waste.

The same RCRA citizen suit provision authorizes an action only where a solid or hazardous waste "may present an *imminent* and substantial endangerment to health or the environment." The Ninth Circuit has also held that a citizen suit may be commenced several years after the waste has been fully cleaned up, notwithstanding the "imminent and substantial endangerment" language of the statute.

The questions presented for review are:

1. Whether the citizen suit provision of RCRA authorizes a private party to bring an action for reimbursement of past cleanup costs.

2. Whether the citizen suit provision of RCRA permits an action to be pursued where the solid or hazardous waste was fully remediated prior to commencement of the suit.

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISION INVOLVED 2

STATEMENT OF THE CASE 3

A. Relevant History Of The Subject Property 4

B. Proceedings In The District Court Below 5

C. Proceedings In The Ninth Circuit Court Of Appeals 7

SUMMARY OF ARGUMENT 10

ARGUMENT 13

I. The RCRA Citizen Suit Provision Unambiguously Authorizes An Action Only For Injunctive Relief And Only Where An Imminent Endangerment Exists 13

A. The Express Terms Of The RCRA Citizen Suit Provision Only Authorize Actions For Injunctive Relief 13

B. The Express Terms Of The RCRA Citizen Suit Provision Only Authorize Actions Where Contamination Currently Presents An Imminent and Substantial Endangerment 16

II. Other Sections Of The RCRA Citizen Suit Provision Confirm That Monetary Relief For Past Endangerments Was Not Intended 18

III. A Comparison Of The RCRA Citizen Suit Provision With Comparable Provisions In CERCLA Reaffirms The Absence Of A Cost Recovery Authorization In RCRA 22

A. The Absence Of An Express Statute Of Limitations In The RCRA Citizen Suit Provision 23

B. The Absence Of Statutory Guidance On The Appropriateness Of Costs Sought To Be Recovered Under RCRA 24

C. The Ninth Circuit's Interpretation Would Obviate Other Longstanding Limitations On Private Party Cost Recovery Actions. 25

IV. The Legislative History Of Federal Environmental Citizen Suit Provisions, And The Legislative History Of RCRA In Particular, Confirm That RCRA Citizen Suit Remedies Are Limited 26

A. The Legislative History Of Environmental Citizen Suit Provisions . . 27

B. The Legislative History Of The RCRA Citizen Suit Provision 30

C. The Legislative History Of The Subsequent Amendments To CERCLA's Citizen Suit Provisions Confirms Congress's Intent To Limit RCRA's Citizen Suit Authorization To Injunctive Relief Claims 33

V. The Ninth Circuit Improperly Implied A Private Party Right Of Action For Cost Recovery 35

A. There Can Be No Implied Right Of Action For Damages In The RCRA Citizen Suit Provision Because the *Cort v. Ash* Criteria Are Not Met 35

B. This Court's Decision In The *Sea Clammers* Case Reaffirms The Unavailability Of An Implied Right Of Action For Damages Under RCRA 39

VI. The Analysis Of The Ninth Circuit, Which Relies Heavily On Parallels Between Sections 6972 And 6973 And On Eighth Circuit Precedents, Does Not Withstand Scrutiny 41

A. The Eight Circuit Did Not Reach The Issue Of the Governmental Right To Recover Cleanup Costs Under Section 6973 43

B. The Governmental Suit Provision (Section 6973) is Distinct From The Citizen Suit Provision (Section 6972) . . 45

CONCLUSION 47

TABLE OF AUTHORITIES

CASES

Bayless Invest. & Trad. Co. v. Chevron U.S.A., Inc.,
39 Env't. Rep. Cas 1428 (D. Ariz. 1994) 35

California v. Sierra Club, 451 U.S. 287 (1981) 36

City of Chicago v. Environmental Defense Fund,
___ U.S. ___, 114 S.Ct. 1588 (1993) 36

Commerce Holding Co., Inc. v. Buckstone,
749 F.Supp. 441 (E.D.N.Y. 1990) 35

Cort v. Ash, 422 U.S. 66 (1975) ..... passim

Furrer v. Brown, 62 F.3d 1092
(8th Cir. 1995) ..... passim

Gache v. Town of Harrison,
813 F.Supp. 1037 (S.D.N.Y. 1993) 35

Gutierrez v. Mobil Oil Corp.,
798 F.Supp. 1280 (W.D. Tex. 1992) 44, 45

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.,
484 U.S. 49 (1987) ..... passim

Hallstrom v. Tillamook County, 493 U.S. 20 (1989) passim

KFC Western, Inc. v. Meghrig,
23 Cal.App.4th 1167, 28 Cal.Rptr.2d 676
(1994) 5, 22

Key Tronic Corp. v. United States,
114 S.Ct. 1960 (1994) 22, 26

Kaufman and Broad - South Bay v. Unisys Corp.,
822 F.Supp. 1468 (N.D. Cal. 1993) 34

M.E.S.S. v. Weinberger,
707 F.Supp. 1182 (E.D. Cal. 1988) 35

Middlesex County Sewerage Authority v. National Sea Clammers Assn., 453 U.S. 1 (1981) ..... passim

Mola Dev. Corp. v. United States,
22 Env't. Rep. Cas. 1443 (C.D. Cal. 1985) ... 35

Portsmouth Redev. & Housing Auth. v. BMI Apt. Assoc.,
847 F.Supp. 380 (E.D. Va. 1994) 34

Touche Ross & Co. v. Redington,
442 U.S. 560 (1979) 36, 37

Transamerica Mortgage Advisors, Inc. v. Lewis,
444 U.S. 11 (1979) 36

United States v. Aceto Agric. Chem. Corp.,
872 F.2d 1373 (8th Cir. 1989) 41, 42, 43

United States v. Jones & Laughlin Steel Corp.,
804 F.2d 348 (6th Cir. 1986) 44, 45

United States v. Northeastern Pharmaceutical & Chem. Co.,
810 F.2d 726 (8th Cir. 1986) cert. denied 484
U.S. 848 (1987) 41

Wilshire Westwood Assocs. v. Atlantic Richfield Corp.,
881 F.2d 801 (9th Cir. 1989) 25

STATUTES

15 U.S.C. § 2619, Toxic Substances Control Act 27

16 U.S.C. § 1540(g), Endangered Species Act 27

28 U.S.C. § 1254 2

30 U.S.C. § 1270, Surface Mining Control and Reclamation Act ..... passim

33 U.S.C. § 1365, Federal Water Pollution Control Act ..... passim

33 U.S.C. §1415(g), Marine Protection, Research and Sanctuaries Act ..... passim

42 U.S.C. § 300j-8 Safe Drinking Water Act 27

42 U.S.C. § 4911, Noise Control Act 27

42 U.S.C. § 6921. 40

42 U.S.C. § 6928 40

42 U.S.C. § 6972, RCRA ..... passim

42 U.S.C. § 6973 40

42 U.S.C. §§ 7603, 7604 Clean Air Act 27, 44

42 U.S.C. §§ 9601-96, CERCLA ..... passim

43 U.S.C. § 1349, Outer Continental Shelf Lands Act 27

40 C.F.R. §§ 300.400 - 300.440 24

MISCELLANEOUS

4 W. Rodgers, *Environmental Law* § 7.6(b) 35

7 James W. Moore, *Moore's Federal Practice*, ¶ 65.04[1], 65-84 (2d ed. 1994) 14

116 Cong.Rec. 33104 (1970) 28, 29

118 Cong.Rec. 33717 (1972) 30

Boyer & Meidinger, *Privatizing Regulatory Enforcement*, 34 Buff. L. Rev. 833, 847-851 (1985) 27

Fadil, *Citizen Suits Against Polluters*, 9 Harv. Envt'l L. Rev. 23, 26-28 (1985) 27

D. Dobbs, *Remedies* §§ 4.2-4.3 (1973) 38

H.R. Rep. No. 198, 98th Cong., 2d Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612 ..... passim

H.R. Rep. No. 253, pt. 3, 99th Cong., 1st Sess. (1985) 34

H.R. Rep. No. 911, 92nd Cong., 2nd Sess. 133 29

G. Palmer, *The Law of Restitution* §§ 1.1-1.8 (1978) . 38

S. Cooke, *The Law of Hazardous Waste* § 16.03(3)(f) (1995) 35

S. Rep. No. 284, 98th Cong., 1st Sess. 57 (1983) 32

S. Rep. No. 414, 92nd Cong., 2nd Sess. 79 29

Water Pollution Control Legislation, Hearings before the Subcomm. on Air and Water Pollution, Senate Comm. on Public Works, 92d Cong., 1st Sess. pt. 1, 114 (1971) 29

No. 95-83

In the Supreme Court of the United States

OCTOBER TERM, 1995

Alan Meghrig and Margaret Meghrig,
Petitioners,
vs.
KFC Western, Inc.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (Pet. App. A1-A20) is reported at 49 F.3d 518. The order of the Court of Appeals (Pet. App. A26) denying the Meghrigs' petition for rehearing is unreported. The order and opinion of the District Court dismissing the action (Pet. App. A21-A23) is unreported.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on March 1, 1995. A timely petition for rehearing was denied on April 14, 1995. The petition for writ of certiorari was filed on July 13, 1995, and was granted on September 27, 1995. The jurisdiction of this court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 42, United States Code, § 6972(a)(1)(B), provides, in pertinent part, that:

> "Except as provided in subsection (b) or (c) of this section, *any person may commence a civil action* on his own behalf--
>
> (1)(A) ***
>
> (B) *against any person,* including the United States, and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, *who has contributed* or who is contributing *to the past or present handling,* storage, treatment, transportation, or disposal *of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment;*
>
> * * *

> *The district court shall have jurisdiction,* without regard to the amount in controversy or the citizenship of the parties ... *to restrain any person* who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), *to order such person to take such other action as may be necessary, or both,* or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.[1]

STATEMENT OF THE CASE

This case arises out of the cleanup of gasoline-contaminated soil at a commercial property located in Los Angeles, California upon which a gasoline service station was once operated. The District Court dismissed the case for lack of subject matter jurisdiction following Petitioners' second motion therefor pursuant to Federal Rule of Civil Procedure 12(b)(6). The case is here following reversal of the District Court's decision by the Ninth Circuit Court of Appeals.

Because the issues on appeal were raised at the pleading stage, the facts set forth below, though disputed in many instances by Petitioners and incomplete in other instances, are primarily those alleged by Respondent in its first amended complaint. Additionally, certain findings of fact made by the court in the parallel state court action when it

---

[1] Section 6972 of Title 42, United States Code, has been reprinted in its entirety at Pet. App. A27-A32.

granted summary judgment in favor of Petitioners on July 11, 1995,[2] are added sparingly to complete the factual picture for this Court.

A. Relevant History Of The Subject Property

The real property which is the subject of the underlying action is presently owned by Respondent (plaintiff below) KFC Western, Inc. ("KFC"), which operates a Kentucky Fried Chicken franchise on that property. (J.A. 6, 13, 24.) KFC bought the property from Petitioners (defendants below) Alan Meghrig and Margaret Meghrig ("the Meghrigs") twenty years ago, in or about September 1975. (J.A. 6, 13, 24.)

The Meghrigs, who are brother and sister, had owned the property for 12 years prior to 1975. (J.A. 24.) Title had been put in their names by their father when he acquired the property in 1963, while both Petitioners were teenagers. The Meghrigs never operated a service station on the property. (J.A. 24.) Prior owners and/or their lessees had operated gasoline service stations on the property for 45 years (dating back to 1917) before the Meghrigs bought it. (J.A. 25.) Plaintiff has not sued any of those prior owners or lessees. (J.A. 5-20.)

KFC discovered the contamination in October 1988, commenced remediation, and *completed that remediation* in

---

[2] The state court's Amended Order With Findings of Fact and Conclusions of Law ("Findings of Fact") appears in the record as Exhibit A to the Meghrigs' Memorandum of Points and Authorities in Opposition to Motion to Dismiss Without Prejudice; Request for Imposition of Attorneys' Fees as Condition of Dismissal or, In The Alternative, Request for Stay, which was filed in the United States District Court on October 5, 1995. The Findings of Fact have been reprinted in the Joint Appendix. (J.A. 23-30.)

March 1989. (J.A. 6, 13, 25.) The cleanup was certified complete by the appropriate governmental agency in May 1989. The Meghrigs were unaware of the contamination until well after the completion of remediation. (J.A. 26.)

B. Proceedings In The District Court Below

KFC first brought suit in the District Court in late May 1992, over three years after the completion of remediation. (J.A. 5-11, 25.) KFC's District Court complaint consisted of a single cause of action brought under the citizen suit provision of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a)(1)(B). The complaint sought only monetary damages for past cleanup expenses which KFC had allegedly incurred. (J.A. 11.)

KFC did not plead that any "imminent and substantial endangerment" existed at the time it filed suit. Rather, KFC only pled that the alleged contamination "*may have presented*" (in the past) an imminent and substantial endangerment. (J.A. 10.)

[KFC had earlier sued these same two defendants in California state court under nine different state statutory and common law theories. *See, KFC Western, Inc. v. Meghrig*, 23 Cal. App. 4th 1167, 28 Cal. Rptr. 2d 676 (1994). In that action, as here, KFC sought to recover damages in the form of monies it had expended several years earlier to remediate soil contamination on the property. Two demurrers to those nine causes of action were sustained, the second without leave to amend, based on statutes of limitations and failure to state a claim. Limited portions of two causes of action were reinstated on appeal, but defendants recently obtained summary judgment as to those two causes as well. (J.A. 23-30.)]

In the District Court, Petitioners moved to dismiss KFC's original RCRA complaint on two independent grounds: (1) because the complaint admitted that the alleged contamination had been fully remediated more than three years prior to the filing of KFC's complaint, the contamination did not present an "imminent and substantial endangerment," as required for RCRA citizen suits; and (2) because KFC sought only money damages, it could not maintain a citizen suit under RCRA, because that statute only authorizes injunctive relief. The District Court granted the Meghrigs' initial motion but allowed KFC leave to amend. (Pet. App. A24.)

KFC's amended complaint attempted to cure the defects in its original complaint by alleging: (1) that the contamination "may have presented" (at some time in the past) an imminent and substantial endangerment; and (2) that its damages claim was really one for "equitable restitution." (J.A. 19.) Petitioners again moved to dismiss on the grounds that these wording changes did not cure the defects in KFC's RCRA cause of action because: (1) the endangerment was still not "imminent," irrespective of what it "may have been" at some past time; and (2) KFC's "equitable restitution" claim, regardless of its new label, sought no more than did KFC's original complaint, *i.e.* money damages.

The District Court relied on two independent grounds in granting the Meghrigs' renewed motion to dismiss, this time without leave to amend. First, the District Court determined that the citizen suit provision of RCRA under which KFC had brought this action was forward-looking and was designed to provide a method for private citizens to function as private attorneys general to bring suit to curtail *current* risks posed by contamination. (Pet. App. A22-A23.) The District Court then concluded that, because the RCRA citizen suit provision authorizes such suits only where there is

an "*imminent* and substantial endangerment to health or the environment," and because the cleanup at issue here was completed several years before KFC commenced its suit, there was no endangerment to be addressed. KFC's suit was therefore not authorized by RCRA. (Pet. App. A22.)

Second, the District Court ruled that the provision of RCRA that authorizes district courts to "restrain" and to "order such person to take such other action as may be necessary" entitles plaintiffs like KFC only to injunctive relief (prohibitory or mandatory). The District Court concluded that, because KFC was seeking damages in the form of costs incurred for a completed cleanup, the relief which KFC sought could not be granted under section 6972(a)(1)(B). (Pet. App. A22-A23.)

C. Proceedings In The Ninth Circuit Court Of Appeals

In December 1992, KFC appealed the judgment of the District Court to the Ninth Circuit Court of Appeals. On March 1, 1995, a divided Court of Appeals, in an opinion by Circuit Judge Pregerson, reversed the judgment of the District Court. (Pet. App. A1-A12.) Circuit Judge Brunetti issued a lengthy and pointed dissenting opinion. (Pet. App. A12-A20.)

The majority opinion first addressed the issue whether the endangerment must exist at the time of filing suit in order to meet the "may present an imminent and substantial endangerment" requirement of a RCRA citizen suit. The majority acknowledged that KFC had cleaned up the gasoline contamination more than three years prior to filing suit and further observed that the legislative history of RCRA disclosed that the term "imminent" in the RCRA citizen suit provisions means that a claim lies only:

> "for events which took place at some time in the past, but *which continue to present a threat* to the public health or the environment."
>
> (Pet. App. A4) (emphasis in original).

Nevertheless, the majority opinion concluded that RCRA authorizes citizen suits with respect to contamination that only *in the past* posed imminent and substantial danger. (Pet. App. A5.) The majority relied on *dicta* from two Eighth Circuit cases brought by EPA, not a private party, under a separate provision of RCRA, section 6973. *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373 (8th Cir. 1989); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986).

The majority also relied on its own general reading of RCRA as having the broad purpose of providing authority to the courts to grant all relief necessary to ensure protection of human health and the environment. (Pet. App. A6.) The court determined that a citizen suit for compensatory damages could be implied under RCRA based on the following statutory language:

> "[T]he district court shall have jurisdiction ... to restrain any person who has contributed or who is contributing to [an imminent and substantial endangerment and to] *order such person to take such other action as may be necessary*..."
>
> (Pet. App. A6) (*quoting* 42 U.S.C. § 6972(a)(1)(B) (emphasis supplied by majority opinion.))

Finally, the majority concluded that it simply would be

poor public policy to interpret the RCRA citizen suit provision to forbid the recovery of cleanup costs because the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-75, and state law do not provide adequate substitute sources of relief. In a footnote, the Court of Appeals explained that CERCLA specifically excludes suits based on petroleum contamination. It then cryptically observed as to state law claims that:

> "Even though causes of action for nuisance, trespass and potential negligence are available to plaintiffs such as KFC, tort remedies are generally inadequate because of the difficulties of proof and attendant court delays."
>
> (Pet. App. A11 n.6.)

Judge Brunetti's vigorous dissent urged four separate bases for affirming the District Court's opinion:

1. Both the plain language of the phrase "order such person to take such other action as may be necessary" and the specific legislative history of the RCRA citizen suit provision demonstrate that Congress did not intend environmental citizen suits to include actions for monetary reimbursement. (Pet. App. A13-A14.)

2. The unambiguous term "may present an imminent and substantial endangerment" means that the endangerment must exist at the site at the time the private citizen files suit. The statute would read "may or *may have* presented" if it intended to also cover past endangerments. (Pet. App. A14.)

3. The notice requirements of § 6972 of RCRA

further support the requirement that the "imminent and substantial endangerment" be present at the time of filing suit. The statute requires that a private citizen give 90 days' notice to the alleged violator, to the EPA Administrator and to the appropriate state agency, and further provides that, if the EPA Administrator or the state elects to bring suit, a private citizen is foreclosed from bringing suit. The dissent urged that these notice and bar provisions confirmed that the "imminent and substantial endangerment" must exist at the time the suit is filed and that the citizen suit provisions do not permit post-cleanup reimbursement actions. (Pet. App. A14.)

4. The absence of an express statute of limitations in RCRA, particularly in light of the fact that an express limitations period is provided by CERCLA, further confirms that RCRA does not authorize citizen suits for damages. (Pet. App. A15-A16.)

SUMMARY OF ARGUMENT

Our discussion of the reasons that the Ninth Circuit's majority decision should be reversed begins, as it should, with an analysis of the unambiguous language of the RCRA citizen suit provision. That provision gives the district courts jurisdiction to either "restrain" a person who is contributing to the handling of a solid or hazardous waste which poses an "imminent and substantial endangerment" to human health, or "to order such person to take such other action as may be necessary," or both. In other words, it authorizes a prohibitory injunction, a mandatory injunction, or both, where an endangerment is imminent, and nothing more. It does not authorize a suit in the district courts to address past endangerments, nor does it authorize a suit to recover costs previously expended to clean up contaminated property.

In fact, the RCRA citizen suit provision elsewhere

requires that notice be given to: (a) the alleged contaminator, (b) to the EPA, and (c) to the state where the property is located, and affords those persons a 90 day period within which to take action. If action is undertaken by the EPA or the state, a citizen suit is absolutely barred by the statute. Thus, the notice and bar provisions reaffirm the entitlement to injunctive relief only. If a party could simply clean up the property itself and then turn around and sue an allegedly responsible party, these provisions would have neither meaning nor purpose.

A comparison of the RCRA citizen suit provision with provisions in other statutes which *do* authorize citizens to sue for cost recovery confirms the limitation of RCRA citizen suits to injunctive relief only. When Congress intends to provide a citizen plaintiff with a right of action for damages, it explicitly does so, as it did in the Surface Mining Control and Reclamation Act ("SMCRA"). Moreover, when Congress intends to authorize parties to sue for cost recovery with respect to cleanup of contaminated property, it provides detailed cost evaluation guidelines like the National Contingency Plan in CERCLA and provides a statute of limitations, as it also did in CERCLA. Indeed, to adopt the Ninth Circuit's reasoning here would summarily override several important limitations in CERCLA, the primary federal property contamination statute, including its application only to hazardous substances, its exclusion for petroleum products, and its lack of an attorney's fees provision.

Petitioners' analysis is not founded solely upon a "plain meaning of the statute" argument. Their arguments are fully buttressed by the legislative history of RCRA's citizen suit provision, as well as the legislative history of citizen suit provisions in environmental statutes generally. Indeed, during the evolution of environmental statutes, Congress has consistently evinced a well-documented reluctance to permit

citizens to sue for damages in environmental statutes for fear of spawning a flood of new federal court litigation. And finally, the limited scope of the RCRA citizen suit provision is absolutely confirmed by the legislative history of the 1986 CERCLA amendments, which amendments were undertaken *after* the most recent amendments to RCRA.

Since the RCRA citizen suit provision does not by its terms provide for a private party right of action for damages, if one is to be created, it must be done by implication. But this Court has clearly held in *Cort v. Ash* and *Middlesex County Sewerage Authority v. National Sea Clammers Assn.* that creating rights of action by implication is highly disfavored and is permissible only when certain criteria are met. None of those criteria are present here.

The Ninth Circuit's opinion below implied a cause of action without addressing the factors set forth in *Cort v. Ash* and without addressing this Court's *Sea Clammers* decision. Rather, it based its interpretation of the "order such person to take such other action as may be necessary" portion of the RCRA citizen suit provision on its analysis of two Eighth Circuit Court of Appeals precedents dealing with a separate provision of RCRA which authorizes suits by the government. The Eighth Circuit has now soundly rejected the Ninth Circuit's interpretation of its precedents in its recent decision in *Furrer v. Brown*. (Pet. Rep. A17-A20.)[3] Moreover, a comparison of the RCRA citizen suit provision with the RCRA government suit provision does not, when properly analyzed, support the Ninth Circuit's conclusion.

---

[3] On October 30, 1995, the Eighth Circuit denied plaintiff's Petition for Rehearing and Suggestion for Rehearing En Banc in *Furrer v. Brown*. Only two circuit judges indicated that they would grant the suggestion for rehearing.

For all of these reasons, we ask this Court to reverse the Ninth Circuit's decision in its entirety.

ARGUMENT

This case presents two questions: (1) whether the RCRA citizen suit provision is limited to injunctive, rather than monetary, relief, and (2) whether the RCRA citizen suit provision requires that an imminent and substantial endangerment exist at the time of filing suit. The answer to both questions is in the affirmative, and an affirmative answer to either one requires reversal in this case. *See also* Pet. App. A12-A13.

I. The RCRA Citizen Suit Provision Unambiguously Authorizes An Action Only For Injunctive Relief And Only Where An Imminent Endangerment Exists

As this Court has repeatedly stated, "the starting point for interpreting a statute is the language of the statute itself." *Hallstrom v. Tillamook County*, 493 U.S. 20, 25 (1989).

A. The Express Terms Of The RCRA Citizen Suit Provision Only Authorize Actions For Injunctive Relief

The RCRA citizen suit provision expressly provides only the following two remedies where the handling of a hazardous or solid waste has created an imminent and substantial endangerment:

> "The district court shall have jurisdiction...to [1] *restrain any person* who has contributed or who is contributing to the past or present

> handling...of any solid or hazardous waste [which may present an imminent and substantial endangerment to human health or the environment, or] [2] *to order such person to take such other action as may be necessary, or both....*

42 U.S.C. § 6972(a)(1)(B) (emphasis added).

The district court's jurisdiction "to restrain" undisputedly confers the power to issue an injunction prohibiting a person from acting in a manner which may be creating an imminent and substantial endangerment. The term "order such person to take such other action as may be necessary" allows courts to issue mandatory injunctions as well; to order contamination cleanup, for example. The reference to "such other action" in this phrase denotes mandatory injunctive relief different from or in addition to the action required of "such person" pursuant to a restraining order.[4] The "as may be necessary" language allows district courts to order measures required to stabilize and/or eliminate the imminent and substantial endangerment.

Mandatory injunctive relief is important in the RCRA context because citizen-plaintiffs may need to make defendants both *stop* causing a solid waste problem and *start* doing something, i.e., cleaning it up. The RCRA citizen suit

---

[4] Congress's decision to grant district courts separate and explicit jurisdiction to issue both prohibitory and mandatory injunctions, rather than simply providing for a more general injunctive power, should be viewed under the presumption that Congress was aware of the traditional reluctance of federal courts to issue preliminary mandatory injunctions. *See* 7 James W. Moore, *Moore's Federal Practice*, ¶65.04[1], 65-84 (2d ed. 1994). By specifically granting district courts jurisdiction to issue mandatory injunctions, Congress may have intended to dispel the longstanding concerns of federal courts regarding the issuance of mandatory injunctions before a hearing on the merits.

provision is unambiguous in this regard, and it neither expressly nor implicitly grants a district court jurisdiction to award a plaintiff costs it has incurred where the plaintiff has chosen to itself clean up a solid waste problem.

As noted above, this Court has repeatedly instructed the federal courts that unambiguous statutory language should be accorded its plain meaning. *See Hallstrom v. Tillamook County*, 493 U.S. 20, 28 (1989) (construing the RCRA citizen suit provision and stating that plain statutory language is conclusive absent a "clearly expressed legislative intention to the contrary.") This Court has further instructed the federal courts that "to acknowledge ambiguity is not to conclude that all interpretations are equally plausible." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 57 (1987). Thus, even to the extent that the language in question may be ambiguous, its "most natural reading" (*id.*) is as a grant of jurisdiction to provide mandatory injunctive relief for existing harms and not monetary relief for harms addressed in the past.[5] The Ninth Circuit erroneously relied on the language allowing district courts to "order such person to take such other action as may be necessary" as the basis for a compensatory damages action. The statutory language cannot be stretched this far.

When Congress *intends* an action for monetary relief to be available to citizen plaintiffs it *expressly* says so. Indeed, the only environmental statute that has a citizen suit provision authorizing an action for damages is the Surface

---

[5] The Court of Appeals did not indicate whether it viewed the language at issue as ambiguous or unambiguous. Apparently, that court concluded that language allowing district courts to order parties to take "such other action as may be necessary" unambiguously provides for monetary relief. However, the Court provided no analysis other than to state that it "agree[d] with KFC that RCRA authorizes a restitutionary remedy...." Pet. App. at A6.

Mining Control and Reclamation Act ("SMCRA"). Section 520(f) of SMCRA, captioned "Action for damages", provides:

> "Any person who is injured in his person or property through the violation by any operator of any rule, regulation, order, or permit issued pursuant to this chapter *may bring an action for damages*."
>
> 30 U.S.C § 1270(f) (emphasis added).

The clarity of the damages remedy provided in the SMCRA citizen suit provision contrasts starkly with the RCRA citizen suit provision. Congress plainly has no difficulty in evincing its intent to provide a damages remedy.

B. The Express Terms Of The RCRA Citizen Suit Provision Only Authorize Actions Where Contamination Currently Presents An Imminent and Substantial Endangerment

The RCRA citizen suit provision only provides for relief as against any person:

> "who has contributed or who is contributing to the past or present handling . . . of any solid or hazardous waste *that may present* an *imminent and substantial endangerment* to human health or the environment."
>
> 42 U.S.C. § 6972(a)(1)(B) (emphasis added).

The statute thus clearly requires that the endangerment be *imminent*, even if the acts which caused it occurred at some

time in the past.

This Court addressed a closely analogous issue in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987). In *Gwaltney*, respondent argued that an action should lie for wholly past violations of the Federal Water Pollution Control Act ("FWPCA") under that Act's citizen suit provision. The FWPCA citizen suit provision contains language that allows suit only against parties alleged "to be in violation" of the Act. This Court, noting the statute's use of the present tense, concluded that the FWPCA citizen suit provision does not apply to violations that were wholly past. This Court stated that:

> "Congress could have phrased its requirement in language that looked to the past ('to have violated'), but it did not choose this readily available option."
>
> *Gwaltney*, 484 U.S. at 57-59.

Here, the same present tense language allows suit only for conditions "*which may present* an *imminent* and substantial endangerment." 42 U.S.C. § 6972(a)(1)(B) (emphasis added). Congress could have phrased the RCRA citizen suit provision to reach endangerments that had once existed but which had since been remediated ("which may *have presented* an imminent and substantial endangerment"). However, Congress did not choose this readily available option.

The statutory language does indicate that Congress intended the RCRA citizen suit provision to reach ongoing *conduct* and past *conduct* that has been discontinued. The statute makes liable any person "who *has contributed* or who *is contributing* to the *past* or *present* handling ... of any solid or hazardous waste." 42 U.S.C. §6972(a)(1)(B) (emphasis

added). *See, Gwaltney*, 484 U.S. at 58 n.2. Thus, Congress clearly demonstrated in the specific context of the RCRA citizen suit provision that it recognizes a distinction between its use of the past tense and present tense.

In sum, it is implausible that Congress intended the RCRA citizen suit provision to reach not only waste which may currently present an imminent endangerment but also waste already cleaned up which presented an endangerment in the past when it chose to phrase the operative provision in the present tense only.

II. Other Sections Of The RCRA Citizen Suit Provision Confirm That Monetary Relief For Past Endangerments Was Not Intended

Other sections of the RCRA citizen suit provision confirm that it provides a limited right of action to enjoin ongoing harms and not a broad damages remedy for the recovery of past cleanup costs.

The RCRA citizen suit provision also contains a notice section that requires citizens to give 90 days' notice of an endangerment to the persons alleged to have contributed, or to be contributing, to the handling of the solid or hazardous waste in question, as well as to the Administrator of EPA and the State. 42 U.S.C. § 6972(b)(2)(A).[6] If the Administrator

---

[6] The notice provision reads:

"No action may be commenced under subsection (a)(1)(B) of this section prior to ninety days after the plaintiff has given notice of the endangerment to --

(i) the Administrator;

(ii) the State in which the alleged endangerment may occur;

(iii) any person alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in subsection (a)(1)(B) of this section."

or the EPA commences action with respect to the site within that 90 day period, a citizen suit is barred. 42 U.S.C. § 6972(b)(2)(B).

This Court again addressed a nearly identical provision in *Gwaltney* and determined that the notice requirement confirmed that the citizen suit provision of the FWPCA reached only ongoing and not wholly past violations:

> "Any other conclusion would render incomprehensible [the Act's] notice provision, which requires citizens to give 60 days' notice of their intent to sue to the alleged violators as well as to the Administrator and the State. If the Administrator or the State commences enforcement action within that 60-day period, the citizen suit is barred, presumably because governmental action has rendered it unnecessary. It follows logically that the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit. *If we assume, as respondents urge, that citizen suits may target wholly past violations, the requirement of notice to the alleged violator becomes gratuitous.*
>
> *Gwaltney*, 484 U.S. at 59-60 (emphasis added.)

The same reasoning applies here. The purpose of the 90 day notice requirement is to give the person alleged to

have contributed to, or to be contributing to, the waste problem an opportunity to initiate cleanup or to give the government an opportunity to address the problem. The EPA and state governments have a strong interest in addressing waste problems that present an imminent danger to human health or the environment. In either event, the citizen suit is rendered unnecessary.

If the RCRA citizen suit provision is read to provide a cost recovery mechanism for waste problems previously cleaned up, the notice provision truly becomes gratuitous. Providing notice would simply provide a potential defendant advance warning of a lawsuit. There would be nothing that such a party could do to address the endangerment and thus forestall suit because there would be no endangerment -- the waste would already have been cleaned up. Similarly, with respect to the Administrator and the State, the notice would simply provide information that a waste problem had been cleaned up and that a private party cost recovery lawsuit would be filed. There would be almost nothing the government could meaningfully do with this information. Again, the notice would be gratuitous.

That precise scenario is amply demonstrated by KFC's actions with respect to the Petitioners and the EPA in this case. KFC discovered the contamination in October 1988. It did not give the required RCRA notice to Petitioners or to the EPA or to the state at that time. When it finally did give notice in late 1990, that act was entirely meaningless. Since there was no imminent and substantial endangerment to address by that time, Petitioners and EPA were powerless to take any of the action contemplated by the statute.

Finally, as noted earlier, when, following notice to the EPA, the government begins addressing the endangerment, a citizen suit is completely barred. 42 U.S.C. § 6972(b)(2)(B).

The significance of this bar has been specifically addressed by this Court in reviewing the nearly identical FWPCA citizen suit bar:

> "The bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than supplant governmental action."
>
> *Gwaltney*, 484 U.S. at 60.

In *Gwaltney*, this Court went on to express its concern that governmental enforcement and prosecutorial discretion would be undermined if citizen suits could be brought for wholly past violations where the condition causing the violation had been corrected:

> "[p]ermitting citizen suits for wholly past violations of the [FWPCA] could undermine the supplementary role envisioned for the citizen suit." *Id.*

In the RCRA context, as in the FWPCA, reading a damages remedy into the citizen suit provision would completely supplant governmental action. Such a construction would allow a citizen to: (1) clean up a solid waste site, (2) provide notice to the government and the allegedly responsible party after the cleanup is complete, and then (3) commence suit. It is hard to imagine a situation in which governmental action is more fully supplanted.

III. A Comparison Of The RCRA Citizen Suit Provision With Comparable Provisions In CERCLA Reaffirms The Absence Of A Cost Recovery Authorization In RCRA

Congress has, of course, elsewhere created a comprehensive waste cleanup and cost recovery statute: the Comprehensive Environmental Response, Compensation and Liability Act, ("CERCLA"), 42 U.S.C. §§ 9601-9675.[7] CERCLA provides that any person may seek cost recovery or contribution from any other person who is liable or potentially liable for response costs. 42. U.S.C. §§ 9607(a); 9613(f)(1).[8] A comparison of several aspects of the RCRA citizen suit provision with those in the cost recovery provision in CERCLA demonstrates conclusively that Congress did not intend RCRA to provide a private party cost recovery mechanism.

---

[7] In *Key Tronic Corp. v. United States*, Justices Stevens and Scalia debated whether the CERCLA private party cost recovery action is express or implied. ___ U.S. ___, 114 S. Ct. 1960, 1966 n.11 and 1968 n.* (1994). Petitioners note that if the CERCLA private party cost recovery action is implied, then surely the "RCRA citizen suit cost recovery action" that respondents urge upon this Court is implied. *See*, Section IV of this Brief, *infra*, at 26.

[8] These causes of action are in addition to CERCLA's citizen suit provision, which allows suit to be brought against "any person ... who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to [CERCLA]." 42 U.S.C. § 9659(a)(1). The district court is provided with jurisdiction in such a case "to enforce the standard, regulation, condition, requirement, or order concerned ..., to order such action as may be necessary to correct the violation, and to impose any civil penalty provided for in the violation." 42 U.S.C. § 9659(c).

A. The Absence Of An Express Statute Of Limitations In The RCRA Citizen Suit Provision

The RCRA citizen suit provision does not include an express statute of limitations. On the one hand, the lack of a statute of limitations in the RCRA citizen suit provision is unsurprising, since that provision only authorizes mandatory or prohibitory injunctive relief where an imminent and substantial endangerment exists. As long as the endangerment remains imminent, the cause of action remains viable. After the waste problem is cleaned up and the endangerment ceases, the cause of action is barred. Thus, there is no need for a statute of limitations in the RCRA citizen suit provision if only injunctive relief is authorized.

If on the other hand, the RCRA citizen suit provision provided a damages remedy, the lack of a statute of limitations would be completely anomalous. A cause of action for damages would become viable upon creation or discovery of the imminent danger and would remain viable even *after* the endangerment ended. The limitations period for such a damages cause of action would be undefined by the statute. It is unlikely that Congress intended such a result, particularly where, when Congress *did* expressly provide for cleanup cost recovery in CERCLA, Congress believed it important that an express limitations period[9] accompany such

---

[9] The CERCLA statute of limitations provides that:

"An initial action for recovery of the costs referred to in Section 9607 of this title must be commenced --

(A) for a removal action, within 3 years after completion of the removal action ...

(B) for remedial action, within 6 years after initiation of physical on-site construction of the remedial action ...." 42 U.S.C. § 9613(g)(2).

"No action for contribution for any response costs or

a remedy.[10]

Moreover, to simply assert, as the Ninth Circuit majority does (Pet. App. A9), that the indefinite doctrine of *laches* can substitute for a definite limitations period obscures the point. The lack of a statute of limitations accompanying the RCRA citizen suit provision is compelling evidence that Congress did not intend the RCRA citizen suit provision to provide a damages remedy.

B. The Absence Of Statutory Guidance On The Appropriateness Of Costs Sought To Be Recovered Under RCRA

CERCLA's cost recovery provisions include a mechanism for determining which costs expended by a plaintiff seeking reimbursement are recoverable. Only costs that are "necessary and consistent with the National Contingency Plan" are recoverable. 42 U.S.C. § 9607(a).

---

damages may be commenced more than 3 years after --
(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or
(B) the date of an administrative order under section 9622(g) ... or 9622(h) of this title ...." 42 U.S.C. § 9613(g)(3).

[10] If the Ninth Circuit's decision is upheld, private parties could sue years after contamination had been discovered, and even years after it had been cleaned up. One area of environmental litigation that would be overwhelmingly impacted is suits seeking recovery of costs expended cleaning up gasoline leaks from underground storage tanks. Such suits were generally barred from the federal courts by the petroleum exclusion in CERCLA and are thus subject to state statutes of limitations. If the Ninth Circuit's decision were affirmed, such suits could be filed in federal court under RCRA with no express statute of limitations to be applied. Virtually every citizen-plaintiff with a gasoline tank leak claim could proceed to federal court, including those who have already been barred from proceeding in state court by state statutes of limitations.

The National Contingency Plan contains regulations on "hazardous substance response" that comprise twenty nine pages in the Code of Federal Regulations. 40 C.F.R. §§ 300.400 - 300.440. By contrast, the RCRA citizen suit provision provides no guidance whatsoever as to the types of response costs that are recoverable under its citizen suit provision. This lack of statutory guidance is entirely logical if the RCRA citizen suit provision is limited, as it appears to be, to enjoining imminent and substantial endangerments. If, however, Congress intended RCRA to authorize citizen suits for cost recovery, the lack of definition as to which costs are recoverable would be a momentous omission, particularly given its detailed treatment in CERCLA.[11] In point of fact, Congress did not intend the RCRA citizen suit provision to function as a cost recovery mechanism, and the lack of guidance on the reasonableness of cleanup expenditures is of no moment.

C. The Ninth Circuit's Interpretation Would Obviate Other Longstanding Limitations On Private Party Cost Recovery Actions.

If upheld, the Ninth Circuit's decision would nullify additional important limitations on private party cost recovery actions embodied in CERCLA. First, CERCLA applies only to hazardous substances. A RCRA remedy would apply to *any solid* waste problem -- a much broader universe.

In addition, CERCLA excludes petroleum products from its list of hazardous substances. 42 U.S.C. § 9601(14); *Wilshire Westwood Assocs. v. Atlantic Richfield Corp.*, 881 F.2d 801 (9th Cir. 1989). Responsibility for petroleum

---

[11] Indeed, if the Ninth Circuit's decision were upheld, the lower courts would have to engage in extensive interstitial lawmaking to define which costs are recoverable in this highly technical area.

contaminated property has long resided with state enforcement agencies and state courts. The Ninth Circuit's decision would nullify this important aspect of the CERCLA petroleum exclusion. It would allow petroleum cost recovery actions to be brought in federal court even though Congress expressly provided otherwise under CERCLA.

Finally, the RCRA citizen suit provision authorizes an award of attorney's fees to the prevailing party. 42 U.S.C. § 6972(e). Attorney's fees are not recoverable in private party CERCLA cost recovery actions. *Key Tronic Corp. v. United States*, ___ U.S. ___, 114 S. Ct. 1960 (1994). In all likelihood, Congress decided to allow an attorney's fees award in the RCRA citizen suit provision due to the limited nature of the relief Congress was providing: prohibitory and mandatory injunctive relief. If the Ninth Circuit's ruling is allowed to stand, attorney's fees will be recoverable in a federal "cost recovery" action brought under RCRA, but not under CERCLA. Thus, CERCLA, the statute designed to address the less numerous but potentially more dangerous hazardous substance sites, will provide a less comprehensive remedy, from a plaintiff's perspective, than the RCRA citizen suit provision.

IV. The Legislative History Of Federal Environmental Citizen Suit Provisions, And The Legislative History Of RCRA In Particular, Confirm That RCRA Citizen Suit Remedies Are Limited

As just reviewed, the plain language of RCRA conclusively establishes that its citizen suit provision only authorizes private party claims for injunctive relief to address ongoing dangers and does not provide a cost recovery remedy. This Court has repeatedly stated that the words of a statute are controlling absent a clearly expressed legislative intention to the contrary. *E.g., Hallstrom, supra*, 493 U.S. at 28;

Middlesex County Sewerage Authority v. National Sea Clammers Assn, 453 U.S. 1, 15 (1981) ("*Sea Clammers*"). In this case, not only are there no indicia of such Congressional intent, but the relevant legislative history *confirms* that the citizen suit provision of RCRA is limited to injunctive relief. In fact, the legislative history of RCRA, particularly in light of the history and purpose of citizen suit provisions in environmental statutes, demonstrates that Congress considered including a remedy for monetary relief in RCRA and deliberately decided not to do so.

A. The Legislative History Of Environmental Citizen Suit Provisions

Congress introduced citizen suits into environmental statutory law in the 1970 amendments to the Clean Air Act. Since then, with the Clean Air Act serving as a model, Congress has included citizen suit provisions in virtually every piece of federal environmental legislation.[12] *Hallstrom*, 493 U.S. at 23. Consequently, the citizen suit provisions in the various federal environmental statutes closely resemble one another. Fadil, *Citizen Suits Against Polluters*, 9 Harv. Envt'l L. Rev. 23, 26-28 (1985); *see also*, Boyer & Meidinger, *Privatizing Regulatory Enforcement*, 34 Buff. L. Rev. 833, 847-851 (1985). All, for example, contain a notice provision. All contain a bar to suit if the government is pursuing the matter. Virtually all provide for federal district court jurisdiction regardless of the amount in controversy or the

---

[12] *See, e.g.* Toxic Substances Control Act, 15 U.S.C. § 2619; Endangered Species Act, 16 U.S.C. § 1540(g); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270; Marine Protection, Research and Sanctuaries Act, 33 U.S.C. § 1415(g); Federal Water Pollution Control Act, 33 U.S.C. § 1365; Safe Drinking Water Act, 42 U.S.C. § 300j-8; Noise Control Act, 42 U.S.C. § 4911; Clean Air Act, 42 U.S.C. § 7604; CERCLA, 42 U.S.C. § 9659; Outer Continental Shelf Lands Act, 43 U.S.C. § 1349.

citizenship of the parties.

The general purpose of citizen suit provisions in federal environmental statutes is to allow citizen-plaintiffs to act as "private attorneys general." *Sea Clammers*, 453 U.S. at 14 n.23. But there was concern in Congress, even as the initial citizen suit provisions were being enacted, that a citizen suit provision that provided too broad a remedy could strip the government of prosecutorial discretion, lead to over-enforcement of the environmental laws and overburden the court system. *See, Hallstrom*, 493 U.S. at 29. The balance struck by Congress included the decision not to include a private damages remedy in citizen suit provisions.

This position was articulated in the debates over the first citizen suit provision (in the 1970 Clean Air Act) as follows:

> "It has been argued, however, that conferring additional rights on the citizen may burden the courts unduly. I would argue that the citizen suit provision of [this bill] has been carefully drafted to prevent this consequence from arising. First of all, it should be noted that *the bill makes no provision for damages to the individual*. It therefore provides no incentives to suit other than to protect the health and welfare of those suing and others similarly situated. It will be the rare, rather than the ordinary, person, I suspect, who with no hope of financial gain and the very real prospect of financial loss, will initiate court action under this bill."

116 Cong. Rec. 33104 (1970) (comments of Sen. Hart) *quoted in Sea Clammers*, 453 U.S. at 17 n.27

(emphasis added).

During the floor debates, the citizen suit provision of the Clean Air Act was contrasted with the citizen suit provision of Senate Bill 3201, a pending, separate consumer protection bill that would have authorized private suits for damages:

> "Senate Bill 3201 provides damages and a remedy for recovery of fines and restitution, and other monetary damages. The pending bill is limited to seek [sic] abatement of violation of standards established administratively under the act, and *expressly excludes damage actions*."

Id. at 33102 (comments of Sen. Muskie) *quoted in Sea Clammers*, 453 U.S. at 17 n. 27 (emphasis added).

Senator Muskie then placed in the Record a staff memorandum stating that the availability of damages in the Clean Air Act "would encourage frivolous or harassing suits against industries and government agencies." *Id.* at 33103.

In 1972, Congress enacted the second environmental citizen suit provision as section 505 of the FWPCA. The FWPCA citizen suit provision was explicitly modeled after the Clean Air Act citizen suit provision. *See* S. Rep. No. 414, 92d Cong., 2d Sess. 79 (Citizen participation under the Clean Water Act is "modeled on the provision enacted in the Clean Air Act Amendments of 1970"); H.R. Rep. No. 911, 92d Cong., 2d Sess. 133 ("Section 505 closely follows the concepts utilized in section 304 of the Clean Air Act"). *See also, Gwaltney*, 484 U.S. at 62 ("The Senate and House Reports explicitly connected the FWPCA citizen suit provision to the citizen suit provision of the Clean Air Act, which is

wholly injunctive in nature").

Members of Congress repeatedly characterized the FWPCA citizen suit provision as an "abatement" provision or as an injunctive measure. *See, e.g.*, Water Pollution Control Legislation, Hearings before the Subcomm. on Air and Water Pollution, Senate Comm. on Public Works, 92d Cong., 1st Sess., pt. 1, 114 (1971) ("Any person may sue a polluter to abate a violation ..."). In the accompanying debates, Senator Bayh stated that "[t]hese sorts of citizen suits -- in which a citizen can obtain a injunction but cannot obtain money damages for himself -- are a very useful additional tool in enforcing environmental protection laws". 118 Cong. Rec. 33717 (1972).

B. The Legislative History Of The RCRA Citizen Suit Provision

The legislative history of the 1984 amendments to RCRA reflects the same Congressional intent with respect to citizen suit provisions as RCRA's ancestor environmental statutes: to authorize federal courts to issue injunctive relief to private party plaintiffs but not to award compensatory damages. For example, the House Committee report states that the RCRA citizen suit provision:

> "Confers on citizens a limited right under section 7002 [42 U.S.C. § 6972] to sue to *abate* an imminent and substantial endangerment ...."
>
> H.R. Rep. No. 198, 98th Cong., 2d Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612 (emphasis added).

The report also explains the primary goal of § 6972(a)(1)(B)

as "the *prompt abatement* of imminent and substantial endangerments." *Id.* (emphasis added).

Several House members feared that the amended RCRA citizen suit provision would cause citizens to flood the federal courts with supplemental state-law claims, including tort claims for damages. The debate on this issue is illuminating as to the limitation of the RCRA citizen suit provision to injunctive (abatement) actions. The minority report, for instance, objected to the citizen suit provision because of the failure of the committee to adopt a clarifying amendment:

> "That amendment stated that no district court before which an imminent and substantial endangerment action is brought is empowered to hear related state law claims. That amendment simply clarified what we had understood to be the intention of the citizen suit provision and that is to give citizens a federal cause of action to abate imminent and substantial endangerments created by hazardous waste disposal facilities.
>
> Unfortunately, we believe the citizen suit provision goes much further than was intended because, under a legal doctrine called pendent jurisdiction, citizens will have the opportunity to try to bring all related state claims they may have into the federal court system when they sue to abate imminent hazards .... This could slow down the proceeding which, as we understand it, is intended to be an emergency type action to abate imminent hazards. Instead of ending the imminent hazard, federal judges will be trying to decide cumbersome questions

> of *state law* nuisance, trespass, *and personal and property damage compensation.*

Id., 1984 U.S.C.C.A.N. at 5634-35 (emphasis added).

While Congress decided not to prohibit supplemental state-law claims,[13] the committee majority cautioned that it expected courts:

> "[t]o exercise their discretion concerning pendent jurisdiction in a way that will not frustrate or delay the primary goal of this provision, namely the prompt abatement of imminent and substantial endangerments."

Id. at 53.

It is clear from this debate that all of the Representatives on the committee, both majority and minority members, understood and intended that the RCRA citizen suit provision would provide only injunctive relief. The debate centered on whether a citizen-plaintiff should be permitted to bring in federal court, *inter alia*, a supplemental *state law* cause of action for *"personal and property damage compensation."* The minority would have amended the RCRA citizen suit provision to prohibit the federal courts from exercising supplemental jurisdiction over state law damage claims. The majority decided that such supplemental state law claims should not be prohibited, but urged the federal courts to exercise discretion in exercising supplemental jurisdiction to avoid frustrating the primary goal of the RCRA citizen suit

---

[13] The corresponding Senate Committee Report echoed the House Committee's comments on supplemental jurisdiction. S. Rep. No. 284, 98th Cong., 1st Sess. 57 (1983).

provision -- "the prompt abatement of imminent and substantial endangerments." This entire debate about supplemental jurisdiction over state law damage claims would be nonsensical if Congress intended the RCRA citizen suit provision to provide a federal cause of action for damages.

C. The Legislative History Of The Subsequent Amendments To CERCLA's Citizen Suit Provisions Confirms Congress's Intent To Limit RCRA's Citizen Suit Authorization To Injunctive Relief Claims

The chief difference in the language of the RCRA citizen suit provision from the provisions in the Clean Air Act and FWPCA is the inclusion of the authority to "order such person to take such other action as may be necessary," which appears in RCRA but not the earlier Acts. The only other citizen suit provision that contains the "order such person to take such other action as may be necessary" language is the CERCLA citizen suit provision. 42 U.S.C. § 9659. The legislative history of CERCLA with respect to this provision makes the purpose of this language very clear.

The CERCLA citizen suit was added to that statute by the Superfund Amendments and Reauthorization Act of 1986, two years after the RCRA citizen suit provision at issue here was amended. In considering the CERCLA citizen suit provision, the House Judiciary Committee both referenced and explained RCRA's "order such person to take such other action" language:

> "the cause of action for abatement of an imminent and substantial endangerment, like the one added to [RCRA] in 1984, is designed solely to aid in the clean-up of hazardous waste sites.

The Committee notes that this type of relief is consistent with that available for other actions authorized by this section. *These suits may also be brought for injunctive relief only*, i.e., citizens may seek a restraining order against private parties and/or a mandamus order to require the EPA or other relevant agency to perform a mandatory duty under CERCLA. *None of these actions are for money damages.* They are actions directly related to the principal purpose of the Superfund law -- i.e., to bring about quick identification and effective clean-up of dangerous hazardous waste sites."

H.R. Rep. No. 253, pt. 3, 99th Cong. 1st Sess. (1985) (emphasis added).[14]

In sum, the legislative history of federal environmental citizen suit provisions, read together with RCRA's express legislative history, compels the conclusion that only injunctive relief, and not monetary damages, is available under the RCRA citizen suit provision.[15]

---

[14] The language of the CERCLA amendments bill as it left the Judiciary Committee provided the district court with jurisdiction "to immediately restrain any person contributing to the endangerment ... [or] to order such person to take response action as provided for in this Act." The language in the bill as it passed the House was identical. The Conference Committee deleted the "endangerment" language in the citizen suit as redundant of RCRA and modified the statutory language accordingly. H.R. Rep. No. 253, pt. 3, 99th Cong., 1st Sess. (1985).

[15] In light of the purpose of citizen suits, the overwhelming weight of case authority supports the proposition that monetary relief, whether labelled "economic," "compensatory" or "restitutionary," is not available as part of a RCRA citizen suit cause of action. *Furrer v. Brown*, 62 F.3d 1092 (8th Cir. 1995); *Portsmouth Redev. & Housing Auth. v. BMI Apt. Assoc.*, 847 F.Supp. 380 (E.D. Va. 1994); *Kaufman and Broad - South Bay v. Unisys Corp.*, 822 F.Supp. 1468

V. The Ninth Circuit Improperly Implied A Private Party Right Of Action For Cost Recovery

The RCRA citizen suit provision does not expressly provide a cost recovery remedy. What the Ninth Circuit's decision has created, then, is an implied right of action for damages under the RCRA citizen suit provision.[16] But implied rights of action are permissible only when certain key criteria are met.

A. There Can Be No Implied Right Of Action For Damages In The RCRA Citizen Suit Provision Because the *Cort v. Ash* Criteria Are Not Met

In *Cort v. Ash*, *supra*, this Court listed four factors which guide the process of determining whether implying a

---

(N.D. Cal. 1993); *Gache v. Town of Harrison*, 813 F.Supp. 1037 (S.D.N.Y. 1993); *M.E.S.S. v. Weinberger*, 707 F.Supp. 1182 (E.D. Cal. 1988); *Commerce Holding Co., Inc. v. Buckstone*, 749 F.Supp. 441 (E.D.N.Y. 1990); *Mola Dev. Corp. v. United States*, 22 Env't. Rep. Cas. 1443 (C.D. Cal. 1985); *but see Bayless Invest. & Trad. Co. v. Chevron U.S.A., Inc.*, 39 Env't Rep. Cas. 1428 (D. Ariz. 1994). In addition, before the Ninth Circuit's ruling, the leading treatises on hazardous waste and environmental law had concluded that, under the RCRA citizen suit provision, "it is well settled that" an award of damages is not permitted. S. Cooke, *The Law of Hazardous Waste* § 16.03(3)(f) (1995); *see also* 4 W. Rodgers, *Environmental Law* § 7.6(b) (1992).

[16] The Court of Appeals did not undertake an "implied right of action" analysis. The Court of Appeals instead interpreted the language of RCRA which provides for mandatory injunctive relief ("to order such person to take such other action as may be necessary") expansively as allowing a district court to order a defendant to pay over to a plaintiff in restitution that amount of money that the plaintiff had expended on its cleanup.

right of action is consistent with Congressional intent.[17] The first consideration under *Cort* is whether the plaintiffs are members of a class for "whose *especial* benefit the statute was enacted." *California v. Sierra Club*, 451 U.S. 287, 293 (1981) (*quoting Cort*, 422 U.S. at 78, 80-82). RCRA is a statute designed to benefit the public at large by ensuring environmental safety, rather than focusing on any particular class or group. *City of Chicago v. Environmental Defense Fund*, ___ U.S. ___, 114 S.Ct. 1588, 1590 (1993); *accord California v. Sierra Club*, 451 U.S. 287, 295. Respondent KFC does not belong to a special class to which Congress intended to give special protections under RCRA, and this requisite for an implied right of action is not met.

The second consideration under *Cort* is whether there is any indication of legislative intent, explicit or implicit, to create a federal cause of action for private party cleanup cost recovery. As discussed extensively above, nothing in the RCRA legislative history in any way suggests that Congress intended to grant jurisdiction to district courts to adjudicate

---

[17] This Court phrased the factors as inquiries:

> "*First*, is the plaintiff one of the class for whose especial benefit the statute was enacted, that is, does the statute create a federal right in favor of the plaintiff? *Second*, is there any indication of such a remedy or to deny one? *Third*, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And *finally*, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?"
>
> *Cort*, 422 U.S. at 95 (Emphasis Added).

The *Cort* factors are not of equal weight; the dispositive question is one of legislative intent. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 23-24 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-576 (1979).

claims for recovery of cleanup costs under RCRA's citizen suit provision. *See supra* at 30 - 32. In fact, the legislative history supports the contrary intent.

The third consideration under *Cort* is whether implying a cause of action for recovery of cleanup costs by a private plaintiff is "necessary to make effective the congressional purpose" of RCRA. *See Cort*, 422 U.S. at 84. RCRA itself states that the objectives of the Act "are to promote the protection of health and the environment and to conserve valuable material and energy resources," and then sets forth eleven routes to that goal, none of which relates directly to the citizen suit provision. 42 U.S.C. § 6902(a). The "national policy" statement accompanying RCRA addresses only the reduction or elimination of "the generation of hazardous waste ... as expeditiously as possible," and the appropriate treatment, storage, or disposal of "[w]aste that is nevertheless generated," but does not speak specifically to contaminated property, to its remediation or to recovery of costs of remediation. *Id.* § 6902(b). The overriding purpose of RCRA is clear: to prevent generation of hazardous waste in the first instance, and, further, to dispose of and treat properly that which is produced. In other words, RCRA's goal is to prevent the creation of hazardous waste sites, rather than to promote the cleanup of existing sites.

As to the RCRA citizen suit provision in particular, as reviewed above, the statute has a notice provision and a provision that bars suit when the government is addressing the problem. The obvious goal of these provisions is to forestall citizen suits so that they become available only as a last resort. It is apparent that, while Congress intended to allow citizen suits in order to foster compliance with RCRA's regulations, it wrote the RCRA citizen suit provision to supplement, and not supplant, governmental enforcement efforts. *See supra* at 18 - 21; *Furrer v. Brown*, Pet. Rep. at

A-12.

Indeed, as this Court has observed, the legislative history of the 1984 amendments to the RCRA citizen suit provision further indicates that Congress intended the section to enhance the enforcement of RCRA regulations, that is, the regulation of hazardous waste, and did not intend to give citizens a cause of action for recovery of costs incurred for the cleanup of hazardous waste sites when regulation has failed:

> "[T]he legislative history indicates an intent to strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits."

Hallstrom, *supra*, 493 U.S. at 29.

The fourth consideration under *Cort* is whether the implied cause of action is one that is traditionally relegated to the states, such that it would be inappropriate to infer a cause of action based solely on federal law. Causes of action for recovery of cleanup costs or restitution have been developed by state common law courts and by courts of equity for several centuries. *See* G. Palmer, *The Law of Restitution* §§ 1.1-1.8 (1978); D. Dobbs *Remedies* §§ 4.2-4.3 (1973). Common law courts of general jurisdiction, such as those of the states, have developed and have power to further develop causes of action for recovery of cleanup costs. The California courts to which KFC first turned for relief are an able example. KFC pled fully nine different causes of action in

state court before filing this federal action.[18] This task is in fact uniquely suited to the state courts. Moreover, the duties of a property owner to a successor in title are matters historically determined by state law, and it would thus be inappropriate to imply a cause of action based solely on federal law.

B. This Court's Decision In The *Sea Clammers* Case Reaffirms The Unavailability Of An Implied Right Of Action For Damages Under RCRA

The issue of implied rights of action in a similar context was addressed by this Court in *Middlesex County Sewerage Auth. v. National Sea Clammers Assn.*, 453 U.S. 1 (1981). In *Sea Clammers*, the respondent Association urged this Court to imply a private cause of action for damages in the FWPCA and the Marine Protection, Research, and Sanctuaries Act of 1972 ("MPRSA").

This Court first noted that both the FWPCA and MPRSA "contain unusually elaborate enforcement provisions" providing causes of action both to the government and to private citizens. The Court further reasoned that Congress intended such painstakingly defined remedies to be exclusive:

> "In view of these elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under MPRSA and FWPCA. As we [have] stated, 'it is an elemental canon of statutory

---

[18] Only one cause of action was determined to have failed to state a claim for relief. Six of the remaining eight may have stated a claim for relief but were barred by the applicable statutes of limitations.

> construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.' In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate."

453 U.S. at 14-15 (citations omitted).

This Court further determined that the legislative history of both the FWPCA and the Clean Air Act mandated this conclusion and concluded that:

> "Both the structure of the Acts and their legislative history lead us to conclude that Congress intended that private remedies in addition to those expressly provided should not be implied. Where, as here, Congress has made clear that implied private actions are not contemplated, the courts are not authorized to ignore this legislative judgment."

453 U.S. at 18.

The remedies afforded by RCRA are equally as elaborate as those in the MPRSA and the FWPCA. RCRA authorizes the EPA to respond to violations of the statute with compliance orders, civil suits, and such orders as may be necessary to protect public health and the environment. *See* 42 U.S.C. § 6973; 42 U.S.C. § 6928. The EPA may assess penalties for violations of Subtitle C (42 U.S.C. § 6921 *et seq.*) for noncompliance, and may assess penalties for failure to comply with an EPA Order issued pursuant to 42 U.S.C. § 6973 and 42 U.S.C. § 6928(a). Criminal penalties are available under 42 U.S.C. § 6928(d). In addition, any citizen

may file suit against the EPA where there is an alleged failure of the EPA to perform any non-discretionary act or duty under 42 U.S.C. § 6972(a)(2).

There is, then, no justification for implying a damages right of action under RCRA when measured by the standards set forth in this Court's decisions in *Cort v. Ash* and *Sea Clammers*.

VI. The Analysis Of The Ninth Circuit, Which Relies Heavily On Parallels Between Sections 6972 And 6973 And On Eighth Circuit Precedents, Does Not Withstand Scrutiny

In the case below, the Ninth Circuit noted that section 6973 of RCRA is worded similarly to the RCRA citizen suit provision. Section 6973 is the governmental imminent endangerment provision of RCRA and allows EPA to bring suit against any person who has caused or contributed to a solid or hazardous waste problem that may present an imminent and substantial endangerment to health or the environment.

The Ninth Circuit interpreted two Eighth Circuit precedents to stand for the proposition that EPA could recover costs expended in cleaning up a solid waste site pursuant to section 6973. *United States v. Aceto Agric. Chem. Co.*, 872 F.2d 1373 (8th Cir. 1989); *United States v. Northeastern Pharmaceutical & Chem. Co.*, ("*NEPACCO*") 810 F.2d 726 (8th Cir. 1986) cert. denied 484 U.S. 848 (1987). Relying on the similarity in language between sections 6972 and 6973 and its reading of these two Eight Circuit opinions, the Ninth Circuit concluded that the RCRA citizen suit provision should be read to include a cost recovery remedy.

But the Ninth Circuit's reliance on those precedents

was seriously misplaced. The Eighth Circuit did not actually decide the issue of the recoverability of governmental response costs in *Aceto* and *NEPACCO*. The Eighth Circuit itself expressly reaffirmed that fact after it read the Ninth Circuit's *KFC Western* decision:

> "We think, however, that the [Ninth Circuit] began with a questionable proposition and then mistakenly reached its result in reliance on cases from this Circuit that, when carefully analyzed, do not support the *KFC Western* decision."
>
> *Furrer v. Brown*, Pet. Rep. at A-17.

The "questionable proposition" referred to by the Eighth Circuit was the Ninth Circuit's misinterpretation of a key portion of the legislative history of RCRA in support of its contention that Congress intended to give private citizens the right to recover money damages. *Id.* at A-18 to A-19. The Eighth Circuit further opined that:

> "From an arguably faulty premise, then, the [Ninth Circuit] goes on to misconstrue two Eighth Circuit opinions involving governmental plaintiffs and to conclude that § 6972 authorizes the recovery of cleanup costs by private plaintiffs. *In the two cases from this circuit upon which the KFC Western court relies, the issue of whether cleanup costs may be recovered in a governmental action under § 6973(a) was never before this Court.*
>
> *Id.* at A-19. (emphasis added).

The Eighth Circuit went on to explain, as we review next, how it never considered the issue of governmental entitlement to recovery of cleanup costs under § 6973(a) in *NEPACCO* and *Aceto*. But in any event, as we discuss in the final section of this Brief, an analysis of section 6973 is not directly transferable to section 6972.

A. The Eight Circuit Did Not Reach The Issue Of the Governmental Right To Recover Cleanup Costs Under Section 6973

The Eighth Circuit corrected the Ninth Circuit's misreading of *NEPACCO* and *Aceto* in *Furrer v. Brown*. Pet. Rep. at A19-A20:

> [In *NEPACCO*], the United States in a cross-appeal challenged the district court's refusal to award "response costs" under § 6973(a), a decision made because the court believed the statute required a showing of negligence and the government had made none. The Eighth Circuit reversed that holding on the negligence issue, *but never made a finding that the recovery of response costs was available to the government under § 6973* in the first instance, apparently because the jurisdiction of the district court to award the recovery of such costs under RCRA was unchallenged. The issue may have been overlooked because many of the costs sought by the government were explicitly recoverable as response costs under CERCLA.
>
> In *Aceto*, the RCRA claim for "response costs" had been dismissed by the district court on the basis of its conclusions concerning the

"imminent and substantial endangerment" and the "contributed to" language found in § 6973(a). The Eighth Circuit reversed and remanded for further proceedings, *but again never addressed whether the remedy sought was authorized by § 6973.*

Furrer, Pet. Rep. at A19 (emphasis added).

Thus, the very Court of Appeals that issued the opinions in *Aceto* and *NEPACCO*, has unequivocally concluded that it has not decided the issue of the recoverability of response costs under section 6973.

Indeed, it bears noting that the text of Section 6973 is identical or similar to enforcement provisions in other federal environmental statutes. The analogous provisions of the Clean Air Act, CERCLA and the Clean Water Act do not authorize recovery of monetary damages. Injunctive relief and civil penalties are the only available remedies. *See Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 484 U.S. 49, 61-2 (1987) (Clean Air Act and Clean Water Act citizen suit provisions); *United States v. Jones & Laughlin Steel Corp.*, 804 F.2d 348, 351 (6th Cir. 1986) (Clean Air Act); *Gutierrez v. Mobil Oil Corp.*, 798 F.Supp. 1280, 1285 (W.D. Tex. 1992).

For example, the Clean Air Act contains language virtually identical to Section 6973 of RCRA:

"to immediately *restrain* any person causing or contributing to the alleged pollution to stop the emission of air pollutants causing or contributing to such pollution *or to take such other action as may be necessary*." (emphasis

added).

42 U.S.C. § 7603.

This Court and others have consistently held that monetary damages are unavailable pursuant to *any section* of the Clean Air Act. *See Gwaltney*, 484 U.S. at 61-62; *Jones & Laughlin Steel*, 804 F.2d at 351; *Gutierrez v. Mobil Oil Corp.*, 798 F.Supp. 1280, 1285 (W.D. Tex. 1992).

B. The Governmental Suit Provision (Section 6973) is Distinct From The Citizen Suit Provision (Section 6972)

The Ninth Circuit's analysis is based on the premise that: "[n]othing indicates that Congress intended citizen suits [under section 6972] to serve a purpose different from that served by governmental actions [under section 6973]." Pet. App. A7 n.3. This premise is belied by the statute itself. The RCRA citizen suit provision contains a bar to action if the government is proceeding with enforcement activities. The RCRA citizen suit also contains a notice provision that allows the government to intervene, thus eliminating the need for a citizen suit. *See, Hallstrom*, 493 U.S. at 29; *Gwaltney*, 484 U.S. at 60.

The very committee report that the Ninth Circuit references makes the point very clearly:

"The committee believes [the] expansion of the citizen suit provision will *complement*... the Administrator [of EPA's] efforts to eliminate threats as to public health and the environment, particularly where the Government is unable to take action because of inadequate resources."

H.R. Rep. No. 198, 98th Cong., 2d Sess., pt. I, 53 (1963) *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612 *quoted* at Pet. App. A7 n.3. Moreover, as this Court has repeatedly noted, citizen suits are intended to supplement and not supplant governmental action. *Gwaltney*, 484 U.S. at 60.

Thus, the Ninth Circuit's premise is erroneous. In fact, the statutory language and legislative history overwhelmingly indicate that Congress intended citizen suits to serve a *very different purpose* from that served by governmental actions. Thus, although the language of the citizen suit provision in section 6972 is virtually identical to the language of the imminent hazard provision in section 6973, it does not necessarily follow that the construction of the two sections must be identical.

For example, the differing purposes of the two sections in the context and structure of RCRA could lead to different conclusions regarding the remedies provided by each section. In addition, the intent of Congress as expressed in the legislative history could differ as to the two sections. Finally, the *Cort* analysis as applied to the two sections could lead to different conclusions as to the remedies provided. The Ninth Circuit's apparent conclusion that, because the sections are worded virtually identically they must be construed identically glosses over several important steps in the statutory analysis.

In sum, the analysis of the Ninth Circuit, which relies heavily on a misreading of two Eighth Circuit precedents and on parallels between the RCRA citizen suit provision and section 6973, does not withstand scrutiny.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be reversed. The opinion of the Ninth Circuit should be vacated and the case dismissed.

Dated: November 9, 1995.

Respectfully submitted,

JOHN P. ZAIMES
Counsel of Record

CLIFTON J. McFARLAND
McCLINTOCK, WESTON,
BENSHOOF, ROCHEFORT,
RUBALCAVA & MacCUISH
444 South Flower Street
43rd Floor
Los Angeles, California 90071
(213) 623-2322
Counsel for Petitioners

JOHN P. ZAIMES (Bar No. 091933)
McCLINTOCK, WESTON, BENSHOOF, ROCHEFORT, RUBALCAVA & MacCUISH
444 South Flower Street, Forty-Third Floor
Los Angeles, California 90071-2901
Telephone: (213) 623-2322

Attorneys for Defendants
ALAN MEGHRIG and MARGARET MEGHRIG

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

KFC WESTERN, INC., Plaintiff, vs. ALAN MEGHRIG and MARGARET MEGHRIG) and DOES 1-10, Defendants.	CASE NO. BC 043874 AMENDED ORDER WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Aug. 21, 1995)

PLEASE TAKE NOTICE that the Motion for Summary Judgment of Defendants Alan Meghrig and Margaret Meghrig (the "Meghrigs") in the above-captioned matter came on regularly for hearing at 8:30 a.m. on July 11, 1995 before the Honorable Stephen E. O'Neil in Department 46 of the above-entitled Court. John P. Zaimes of McClintock, Weston, Benshoof, Rochefort, Rubalcava & MacCuish appeared on behalf of defendants and moving parties, the Meghrigs; Daniel Romano

appeared on behalf of plaintiff and responding party KFC Western, Inc.

After considering the papers filed in support of, and in opposition to, the Meghrigs' Motion for Summary Judgment, and the oral argument of counsel, the Court makes the following findings of facts and conclusions of law and grants summary judgment in favor of defendants.

FINDINGS OF FACT

1. Plaintiff is the owner of real property located at 340 North Western Avenue in Los Angeles, California (the "Subject Property"). (Defendants' Undisputed Fact No. 1.)

2. The Meghrigs took title to the Subject Property in March 1963. (Defendants' Undisputed Fact No. 2.)

3. The Meghrigs never owned a gasoline service station business on the Subject Property. (Defendants' Undisputed Fact No. 3; Defendants' Objections to Plaintiff's Response to Fact No. 3.)

4. The Meghrigs never operated a gasoline service station located on the Subject Property. (Defendants' Undisputed Fact No. 4.)

5. A service station did not operate on the Subject Property during the period of the Meghrigs' ownership. (Defendants' Undisputed Fact No. 5.)

6. The Meghrigs took no part in the management of the Subject Property during the 1960s. (Defendants' Undisputed Fact No. 6.)

7. The Meghrigs never undertook any acts which caused gasoline contamination on the Subject Property. (Defendants' Undisputed Fact No. 7.)

8. There was a gasoline service station on the Subject Property from 1917 until 1962, prior to the property's ownership of the Meghrigs. (Defendants' Undisputed Fact No. 8.)

9. Underground storage tanks on the Subject Property were replaced in 1951. (Defendants' Undisputed Fact No. 9.)

10. Underground storage tanks on the Subject Property were completely removed in December 1964. No tanks were placed on the Subject Property thereafter. (Defendants' Undisputed Fact No. 12.)

11. A strip mall was constructed on the Subject Property in 1965. Plaintiff leased a portion of the strip mall from the Meghrigs from May 1965 to the time the Subject Property was sold to plaintiff in 1975. (Defendants' Undisputed Fact No. 10.)

12. Plaintiff discovered the contamination on the Subject Property on or about October 26, 1988. (Defendants' Undisputed Fact No. 11.)

13. Plaintiff completed its cleanup of the Subject Property on or before March 12, 1989. (Defendants' Undisputed Fact No. 13.)

14. Plaintiff filed its initial complaint in this matter on December 9, 1991. (Defendants' Undisputed Fact No. 14.)

15. There is no evidence that plaintiff suffered any actual damage arising out of the contamination of groundwater after December 1, 1988. In fact, plaintiffs' own evidence shows that the groundwater beneath the Subject Property contained less than action level amounts of contaminants in 1988, and no groundwater cleanup was necessary. (Defendants' Undisputed Fact No. 15; Defendants' Objections to Plaintiffs' Response to Fact No. 15.)

16. There is no evidence that plaintiff suffered any actual damage arising out of soil contamination after December 1, 1988. In fact, plaintiffs' own evidence shows that the soil contamination at the Subject Property had naturally biodegraded over time and was decreasing during the 1980s. (Defendants' Undisputed Fact No. 16; Defendants' Objections to Plaintiffs' Response to Fact No. 16.)

17. There is no evidence that the Meghrigs had either actual or constructive knowledge of contamination on the Subject Property. (Defendants' Objections to Plaintiffs' Fact No. 17.)

CONCLUSIONS OF LAW

1. Having presented no evidence that the Meghrigs engaged in any acts, or tortiously omitted to undertake any act, which resulted in contamination of the Subject Property, plaintiff KFC Western, Inc.'s causes of action for continuing public nuisance, private nuisance and trespass fail as a matter of law. *Newhall Land & Farming v. Superior Court*, 19 Cal.App.4th 334, 345, 23 Cal.Rptr. 2d 377, 383 (1993); *RTC v. Rossmoor Corp.*, 34 Cal.App.4th 93 (1995);

Lussier v. San Lorenzo Valley Water District, 206 Cal.App.3d 92, 100, 253 Cal.Rptr. 470 (1988).

2. Having presented no evidence that it suffered any damage within the applicable three-year limitations period, plaintiff KFC Western, Inc.'s causes of action for continuing public nuisance, private nuisance and trespass fail as a matter of law. *Capogeannis v. Superior Court*, 12 Cal.App.4th 668, 676, 15 Cal.Rptr.2d 796 (1993).

3. The money expended by plaintiff to clean up the Subject Property does not constitute damage to the property arising out of nuisance or trespass. *CAMSI IV v. Hunter Technology Corporation*, 230 Cal.App.3d 1525, 282 Cal.Rptr. 80 (1991).

4. Civil Code Section 3483 does not provide a mechanism for a current owner of property to recover costs it expends in abating a nuisance on its property from the immediately preceding owner where the immediately preceding owner did not engage in any acts or omissions which resulted in the creation of the nuisance. *Leslie Salt Co. v. San Francisco Bay Cons. & Dev. Comm.*, 153 Cal.App.3d 605, 200 Cal.Rptr. 575 (1989); *People v. Southern Pacific Co.*, 150 Cal.App.2d Supp. 831, 311 P.2d 200 (1957).

5. To the extent that Civil Code Section 3483 may provide a mechanism for a current owner of property to recover its costs expended in abating a nuisance on its property from a prior owner, recovery may be had only if the prior owner knew of the existence of the nuisance. Since KFC has presented no competent evidence that the Meghrigs knew of the existence of contamination on the

Subject Property during their ownership, KFC's continuing public nuisance and private nuisance causes of action fail, as a matter of law. *Reinhard v. Lawrence Warehouse Co.*, 42 Cal.App.2d 741, 107 P.2d 501, (1940).

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that summary judgment is granted in favor of the Meghrigs and against plaintiff on the grounds that there is no triable issue of material fact with respect to the nuisance and trespass causes of action contained in plaintiff's complaint and that the Meghrigs are entitled to judgment as a matter of law.

DATED: AUG 21 1995

STEPHEN E. O'NEIL
JUDGE OF THE
SUPERIOR COURT

(PROOF OF SERVICE - 1013a, 2015.5 C.C.P.)

STATE OF CALIFORNIA]
] ss.
COUNTY OF LOS ANGELES]

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 444 South Flower Street, Forty-Third Floor, Los Angeles, California 90071.

On August 3, 1995, I served the foregoing document(s) described as **AMENDED ORDER WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Daniel Romano, Esq.
100 Wilshire Boulevard
Suite 1300
Santa Monica, California 90401

X I placed such envelope with postage thereon fully prepaid in the United States mail at Los Angeles, California.

X I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the

party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

_ I sent such document(s) by Federal Express/UPS Air.

_ I delivered such envelope by hand to the offices of the addressees.

X I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

_ I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on August 3, 1995, at Los Angeles, California.

/s/ Alicia D. Araneta
Alicia D. Araneta

(8)

No. 95-83

Supreme Court, U.S.
FILED
DEC 8 1995
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

Alan Meghrig and Margaret Meghrig,
Petitioners

vs.

KFC Western, Inc.,
Respondent

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF FOR THE RESPONDENT

Daniel Romano
Counsel of Record

Sharon Corda
LAW OFFICE OF
DANIEL ROMANO
100 Wilshire Boulevard
Suite 1300
Santa Monica, California 90401
(310) 451-4959
Counsel For Respondent

BEST AVAILABLE COPY

65 pp

QUESTIONS PRESENTED

(1) Whether Section 7002(a)(1)(B) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6972(a)(1)(B), provides federal courts with the authority to award restitutionary relief in the exercise of their equitable jurisdiction to private parties who removed environmental contamination.

(2) Whether RCRA Section 7002(a)(1)(B) conditions the availability of a citizen suit on the existence of an imminent and substantial endangerment at the time that the lawsuit is filed.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

STATEMENT 1

A. History of the Contaminated Property 2

B. Proceedings in the District Court 2

C. Proceedings in the Court of Appeals 4

SUMMARY OF ARGUMENT 6

ARGUMENT 11

I. SECTION 7002(A) OF THE RESOURCE CONSERVATION AND RECOVERY ACT AUTHORIZES FEDERAL DISTRICT COURTS TO EXERCISE THEIR FULL INHERENT EQUITABLE JURISDICTION, INCLUDING THE AWARDING OF RESTITUTIONARY RELIEF, AND DOES NOT EVINCE A CLEAR CONGRESSIONAL INTENT TO LIMIT THE COURTS TO INJUNCTIVE REMEDIES 11

A. Federal Courts, When Interpreting Statutes That Provide For Equitable Relief, Are Presumed To Have Jurisdiction To Grant The Full Range of Equitable Relief-- Absent Some Clear Congressional Directive Or Inescapable Statutory Inference To The Contrary. This Presumption Applies Here And Its Application Is Buttressed By The Statutory Language. 11

B. Petitioners Have Not Overcome The Presumption In Favor Of Full Equitable Jurisdiction 17

C. Petitioners Misconstrue Established Precedent That Has Granted Restitutionary Relief In Environmental Cases And Rejected The Claim That Such Relief Is Tantamount To An Award Of Damages 21

D. The Legislative History Of The Statute Is At Variance With The Statutory Text And Is Ambiguous. Therefore, The Legislative History Cannot Guide This Court's Determination On The Availability Of Restitution For Past Response Costs Under Section 7002(a)(1)(B). 25

II. RCRA SECTION 7002(A)(1)(B) DOES NOT CONDITION THE AVAILABILITY OF A CITIZEN SUIT ON THE EXISTENCE OF AN IMMINENT AND SUBSTANTIAL ENDANGERMENT AT THE TIME THAT THE LAWSUIT IS FILED 29

A. Section 7002(a)(1)(B)'s Express Terms Reflect Congressional Intent To Extend The Citizen Suit Provision To Past Conduct And Their Effects Rather Than To Limit The Scope Of The Provision To Imminent And Substantial Endangerments Existing At The Time That A Lawsuit Is Filed . . . 30

B. RCRA's Stated National Policy "To Minimize The Present And Future Threat To Human Health And The Environment" Is Served By Permitting Citizens To Reduce And Eliminate Imminent and Substantial Endangerments Prior To The Filing Of A Lawsuit 36

C. The Relevant Legislative History Does Not Support Petitioners' Crabbed Reading Of Section 7002(a)(1)(B) . . . 38

D. The Comprehensive Environmental Response, Compensation, And Liability Act, Does Not Require Limiting Section 7002(a)(1)(B) To Endangerments Existing At The Time Of The Lawsuit's Filing 39

E. The United States Is Not Entitled To Any Judicial Deference Regarding The Meaning Of Section 7002(a)(1)(B) . . . 44

CONCLUSION 45

TABLE OF AUTHORITIES

Agricultural Excess & Supplies Inc. v. ABD Tank & Pump Co.,
878 F. Supp. 1091 (N.D. Ill. 1995) 43

Amoco Production Co. v. Village of Gambell,
480 U.S. 531 (1987) 13

Bayless Inv. & Trading Co. v. Chevron U.S.A. Inc.;
No. CIV 93-0704 PHX PGR, 1994 U.S.Dist.LEXIS 12190 (D.Ariz.1994) 22

Bowen v. Georgetown University Hospital,
488 U.S. 204 (1988) 44

Bowen v. Massachusetts,
487 U.S. 879 (1988) 7, 23

Brown v. Swann,
35 U.S. 497 (1836) 15

California v. American Stores Co.,
495 U.S. 271 (1990) 16

Chauffeurs, Local No. 391 v. Terry,
494 U.S. 558 (1990) 20

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 44

Church of Holy Trinity v. United States,
143 U.S. 457 (1892) 38

City of Chicago v. Environmental Defense Fund,
__ U.S. __, 114 S. Ct. 1588 (1993) 27

Clark v. Smith
13 Pet. 195, 10 L. Ed. 123 16

Conroy v. Aniskoff,
__ U.S. __, 113 S.Ct. 1562, 1565 (1993) . . . 33

Cort v. Ash, 422 U.S. 66 (1975) 22, 23

Crandon v. United States,
494 U.S. 152 (1990) 33

Franklin v. Gwinnett County Public Schools,
503 U.S. 60 (1992) 6, 11, 12

Furrer v. Brown,
62 F.3d 1092 (8th Cir. 1995) 5

Green v. Bock Laundry Machine,
490 U.S. 504 (1989) 38

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.,
484 U.S. 49 (1987) 31, 32, 37

Hallstrom v. Tillamook County,
493 U.S. 20 (1989) 32

Hecht v. Bowles,
321 U. S. 321 (1944) 7, 13, 15

Holmburg v. Albrecht,
327 U.S. 392 (1946) 40

John Hancock Mutual v. Harris Trust & Savings Bank,
__ U.S. __, 114 S.Ct. 517, 523 (1993) . . . 8, 33

KFC Western, Inc. v. Meghrig,
23 Cal. App. 4th 1167 (1994) 3

King v. St. Vincent's Hosp.,
502 U.S. 215, 112 S.Ct. 570 (1991) 33

Massachusetts v. Morash,
490 U.S. 107 (1990) 33

Mertens v. Hewitt Assoc.,
__ U.S. __, 113 S.Ct. 2063 (1993) 14

Mid Valley Bank v. North Valley Bank,
764 F. Supp. 1377 (E.D. Cal. 1991) 42

Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n.,
453 U.S. 1 (1981) 22

Mitchell v. Robert De Mario Jewelry, Inc.,
361 U.S. 288 (1960) 15

Paper Recyling Co. v. Amoco Oil Co.,
856 F. Supp. 671 (N.D. Ga. 1993) 43

Porter v. Warner Holding Co.,
328 U.S. 395 (1946) . . . . . passim

Public Citizen v. Department of Justice,
491 U.S. 440 (1989) 38

Romero-Barcelo,
456 U.S. at 313 13

Touche Ross & Co. v. Redington,
442 U.S. 560 (1979) 24

Tull v. United States,
481 U.S. 412 (1987) 7, 20, 21

U.S. National Bank of Oregon v. Independent Insurance Agencies,
__ U.S. __, 113 S.Ct. 2173 (1993) 32, 33

U.S. v. Mottolo,
605 F. Supp. 898 (D.N.H. 1985) 22

United Savings Ass'n of Texas v. Timbers of Inwood Forest Ass'n, Ltd.,
484 U.S. 365 (1988) 32

United States v. Aceto Agrico Chems. Corp.,
872 F.2d 1373 (8th Cir. 1989) 5

United States v. Alcan Aluminum Corp.,
775 F. Supp. 531 (C.D. Cal. 1991) 42

United States v. Northeastern Pharmaceutical & Chem. Co.,
810 F.2d 726 (8th Cir. 1986) 5, 22

United States v. P/B STCO 213,
756 F.2d 364 (5th Cir., 1985) 21, 41, 42

United States v. Price,
688 F.2d 204 (3d Cir. 1982) 5, 22

United States v. Waste Industries,
734 F.2d 159 (4th Cir. 1984) 31

Weinberger v. Romero-Barcelo,
456 U.S. 305 (1982) 7, 13

Wyandotte Transp. Co. v. United States,
389 U.S. 191 (1967) 21

Zands v. Nelson,
779 F. Supp. 1254 (S.D. Cal. 1991) 43

STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 6972(a) . . . . . passim

Resource Conservation and Recovery Act (RCRA),
42 U.S.C. 6972(a)(1)(B) . . . . . passim

42 U.S.C. § 9652 40

42 U.S.C. § 6902(b) 36

42 U.S.C. § 6903(3) 31

42 U.S.C. § 6933 35

42 U.S.C. § 6983 35

42 U.S.C.A. § 9601 v

42 U.S.C. § 9604(a)(1)(A) 34

MISCELLANEOUS

H. R. Committee Print No. 96-IFC 31, 96th Cong., 1st Sess. at 32 (1979) 26

H.R. Rep. No. 198, 98th Cong., 2d Sess., pt. I and II (May 17 & June 9, 1983), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612 . . . . . 25, 26

Restatement of Law, Restitution (1937) 18, 20

Douglas Laycock, Modern American Remedies -- Cases and Materials, 646 (2d ed. 1994) 18

Douglas Laycock, *The Scope and Significance of Restitution*, 67 Tex. L. Rev. 1277 (1989) 18, 20

Saul Levmore, *Explaining Restitution*, 71 Va. L. Rev. 65 (1985) 18

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 49 F.3d 518. The order of the court of appeals (Pet. App. A26) denying petitioners' petition for rehearing is not reported. The order and opinion of the district court dismissing the action (Pet. App. A21-A23) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1995. A timely petition for rehearing was denied on April 14, 1995. The petition for a writ of certiorari was filed on July 13, 1995, and was granted on September 27, 1995. The jurisdiction of this Court is based on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 7002 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972, is reprinted in full in an appendix to this brief.

STATEMENT

This case concerns a current land owner's effort to obtain equitable restitution from the property's prior owners for the costs of cleaning up petroleum wastes that may have presented an imminent and substantial endangerment to human health and the environment and that were disposed of on the property prior to the current owner's purchase. The Ninth Circuit agreed that Section 7002(a)(1)(B) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(B), authorized such a suit for restitutionary relief.

A. History of the Contaminated Property

Respondent KFC Western, Inc. ("KFC") is the current owner of a parcel of property located in Los Angeles, California, which is zoned for commercial use. KFC acquired the property in 1975 from petitioners Alan and Margaret Meghrig ("the Meghrigs"), and KFC has owned and operated a restaurant at the site for the past twenty years. Joint Appendix ("JA") 12-13.

In 1988, KFC began to construct certain improvements upon the property. During the course of construction, KFC learned that its restaurant was built upon and surrounded by soil that had been contaminated by the release of refined petroleum products. The petroleum products appeared to have penetrated the soil as a result of leakage from underground storage tanks present on the property before KFC acquired it and from spills of petroleum not related to underground tanks. The presence of petroleum products had caused elevated levels of lead and benzene to accumulate in the soil. Upon discovery of the contaminated soil, the City of Los Angeles's Department of Building and Safety issued a stop order forbidding further construction until such time as a clearance was issued by the Los Angeles County Department of Health Services. JA 13. In an effort to obtain the clearance, which ultimately was issued, KFC undertook extensive soil remediation work, which cost more than $211,000. KFC completed cleanup in March 1989 and the Department of Health Services issued its formal clearance in May 1989. *Id.* at 14.

B. Proceedings in the District Court

KFC commenced the instant action in the United States District Court for the Central District of California in May

1992.[1] KFC's original complaint pled a single cause of action seeking monetary relief for expenses incurred in remediating the subject property. JA 5-11. The complaint alleged that the Meghrigs had caused the contamination that necessitated the clean-up, by negligently operating a service station on the property and by negligently maintaining the station's underground storage tanks. JA 9, ¶ 14.

The Meghrigs moved to dismiss the complaint for failure to state a claim on two grounds: a) the complaint failed to allege that "imminent and substantial endangerment" existed at the time that the action was commenced; and b) the prayer for monetary relief was the equivalent of a prayer for damages and therefore was beyond the scope of the district court's jurisdiction which, in the Meghrigs' reading of the statute, permits only injunctive relief. The district court granted the motion to dismiss, with leave to amend.

KFC filed an amended complaint, which alleged that the conditions remediated "may have presented an imminent and

---

[1] Respondent KFC has also pursued state law remedies in state court by, in the first instance, filing an action seeking reimbursement of clean-up costs. KFC has not obtained any relief based on these state law causes of action. In *KFC Western, Inc. v. Meghrig*, 23 Cal. App. 4th 1167 (1994) the California Court of Appeal ruled that respondent could not state a cause of action under the state statute which created a fund designed to compensate property owners for the cost of remediating environmental damage caused by leaking underground storage tanks. The Court of Appeal's decision did permit respondent to amend its complaint to allege causes of action for continuing nuisance and trespass. respondent did so, but the trial court in that case recently granted petitioners' motion for summary judgment, based, in part, on its conclusion that respondent did not suffer "any actual damage" even though it also found that respondent discovered contamination at the property and cleaned it up. JA 25-26, ¶¶ 12-13, 15-16.

substantial endangerment" and which also clarified the nature of the relief requested. JA at 12-19. The amended complaint stated that it sought an award of *"equitable restitution"* rather than money damages. JA 17-19 (emphasis added).

Petitioners again moved to dismiss for failure to state a claim on the same grounds advanced in their earlier motion: failure to allege that an "imminent and substantial endangerment" existed at the time that the initial complaint was filed; and a request for monetary relief beyond the district court's jurisdiction, which purportedly is limited to injunctive relief. The district court granted this motion without leave to amend and, accordingly, dismissed KFC's complaint. The court held that both of petitioners' asserted grounds for dismissal were meritorious. Pet.App. A21-A23.

C. Proceedings in the Court of Appeals

KFC appealed the district court's judgment and order of dismissal to the Ninth Circuit. On March 1, 1995 the court of appeals reversed the district court's decision, with one member of the panel dissenting. Pet.App. A1-A20.

The majority held that Section 7002(a)(1)(B) of RCRA does not require that the "imminent and substantial endangerment" be in existence at the time that an action is filed in court. And, the court further held that Section 7002(a)(1)(B) -- particularly when compared to the almost identical language of RCRA Section 7003, a section that empowers the Environmental Protection Agency Administrator to bring suits to remedy imminent and substantial endangerments -- was drafted broadly enough to include within the district court's jurisdiction the authority to award restitutionary relief. Pet.App. A5-A12.

The court of appeals' opinion emphasized that several reported decisions of the Eighth and Third Circuits had concluded that the EPA Administrator had a right to restitutionary relief under the virtually identically-worded RCRA Section 7003 even when the Administrator's action was filed after the conditions creating the imminent and substantial endangerment had ceased to exist.[2]

The court of appeals further found that the equitable considerations in favor of awarding an injured citizen restitutionary relief pursuant to Section 7002(a(1)(B) -- regardless of whether the endangerment still exists at the time that the suit is commenced -- are even more compelling than those that favor such an award to the EPA Administrator since, in the words of the majority opinion:

> "[I]n practice, an interpretation of section [7002](a)(1)(B) that afforded only injunctive relief, not compensation, would make the remedy available only to concerned outsiders, who can never be held responsible for environmental clean-up. We would foreclose a RCRA remedy for the innocent buyers

---

[2] The Ninth Circuit's opinion followed two decisions of the Eighth Circuit, *United States v. Aceto Agrico Chems. Corp.*, 872 F.2d 1373 (8th Cir. 1989) and *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, *cert. denied*, 484 U.S. 848 (8th Cir. 1987) and an earlier decision of the Third Circuit in *United States v. Price*, 688 F.2d 204 (3d Cir. 1982). Pet.App. A5-A7. All three of these decisions permitted the United States to recover post-clean-up restitutionary relief pursuant to Section 7003. However, in its recent decision in *Furrer v. Brown*, 62 F.3d 1092 (8th Cir. 1995) the Eighth Circuit found that *Aceto* and *NEPACCO* "simply assume subject matter jurisdiction *sub silentio*" on the issue of the government's entitlement to response costs.

who clean up contaminated property. In fact, it is even more important for private citizens, as compared to the EPA Administrator, to have a restitutionary remedy under RCRA. A private citizen often cannot control the timing of clean-up actions but, rather, must clean the contaminated property whenever the government obtains an appropriate order. Even the innocent private party, like KFC, who purchases already-contaminated property, often must clean the property immediately and recover secondarily from the actual polluter."

Pet.App. A11.

SUMMARY OF ARGUMENT

1. Section 7002(a)(1)(B) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972(a)(1)(B), provides federal courts with jurisdiction to hear suits brought by private parties to "restrain" a person who is contributing to the handling or disposal of a solid or hazardous waste which creates an "imminent and substantial endangerment" to health or the environment. The statute also expressly grants the federal courts jurisdiction to order such person to "take such other actions as may be necessary."

There is no merit in petitioners' contention that Congress did not confer upon federal courts hearing these citizen suits brought under Section 7002(a)(1)(B) the authority to award restitutionary relief whenever necessary and appropriate. When, as in Section 7002(a)(1)(B), Congress expressly creates a private right of action, the "traditional presumption" is that Congress intends for courts to be able to award "all appropriate relief" (*Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 71 (1992)) and that such relief presumptively extends, at a minimum, to the

district court's complete equitable jurisdiction. *Hecht v. Bowles*, 321 U. S. 321, 329 (1944); *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-314 (1982). "[C]omprehensiveness of equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982), quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946).

In this case, there is no clear and valid legislative command that the full scope of equitable relief, including restitutionary relief, is not available. Indeed, the statutory language itself confirms its availability by expressly authorizing the federal courts to "take such other action as may be necessary" to afford complete relief. Petitioners have not made the slightest effort to overcome the presumption in favor of full equitable relief. Instead, their arguments simply ignore its existence.

Petitioners are equally misguided in contending that an award of restitution pursuant to the citizen suit provision is tantamount to the implication of a private right of action for damages under the statute. Respondent is not suggesting that Section 7002(a)(1)(B) authorizes an action for money damages at law. Notwithstanding petitioners' argument to the contrary, this Court has long drawn a sharp distinction between the restitutionary relief, sought by respondent in this case, which is considered equitable in nature, and awards of compensatory damages and statutory penalties, which are characterized as legal. *Porter v. Warner Holding Co.*, *supra*; *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988); *Tull v. United States*, 481 U.S. 412, 423 (1987). The two

remedies are not at all equivalent.

Likewise unavailing are the excerpts from the legislative history of RCRA's citizen suit provision upon which petitioners rely in support of their claim that the federal courts' jurisdiction to award relief extends only to the issuance of injunctive relief. That legislative history cannot overcome the plain statutory language and is, in any event, subject to multiple layers of ambiguity. The statute, instead of limiting the relief available to injunctive relief, specifically empowers the court to award injunctive relief, *or* "take such other action as may be necessary, *or both.*" In addition, the legislative history excerpts speak only of Congress's intent to provide for prompt abatement of imminent and substantial endangerments. It nowhere indicates any intent on the part of Congress to circumscribe traditional equitable remedies.

2. Section 7002(a)(1)(B) does not restrict the availability of a citizen suit to circumstances in which an "imminent and substantial endangerment" exists at the time that the lawsuit is instituted. The literal language of RCRA section 7002(a)(1)(B) reflects clear congressional intent to extend the citizen suit provision to past conduct rather than to limit the scope of the provision to imminent and substantial endangerments existing at the time that a lawsuit is filed. The repeated references to "past or present" make plain that Congress did not intend to confine this section's reach to the present or future.

In construing the "imminent and substantial endangerment" language, this Court must look to "the provisions of the whole law, and to its object and policy." *John Hancock Mutual v. Harris Trust & Savings Bank*, 114 S. Ct. 517, 523 (1993). The United States claims that the statutory language "unambiguously indicate[s]" that a citizen suit must be filed in response to *specified activities* that "may

present an imminent and substantial endangerment to health or the environment." Petitioners' interpretation is that suits may be filed only for *conditions* "which may present an imminent and substantial endangerment."

Neither the United States nor petitioners are correct. The most natural reading of "which may present an imminent and substantial endangerment" is that it denotes only the kind of "solid or hazardous waste" that can invoke Section 7002(a)(1)(B)'s jurisdiction. The correctness of this reading is reinforced by further language within Section 7002(a). Section 7002(a), in describing the scope of judicial relief available under subsection (a)(1)(B), provides that the district court shall have jurisdiction "to restrain any person who has contributed or is contributing to the past or present handling *. . .of any solid or hazardous waste referred to in paragraph (1)(B).*" Here the statute plainly links the meaning of "solid or hazardous waste" for the purposes of Section 7002(a)(1)(B) to the earlier reference to those types of wastes that "may present an imminent and substantial endangerment." Thus, it is not *activities* that must present the endangerment at some particular time. The activities may, as in the prior portion of the law, occur in the "past or present."

The structure of RCRA as a whole is consistent with respondent's reading of the "imminent and substantial endangerment" language. Although the statute provides for a 90-day notice to the Environmental Protection Agency Administrator, the appropriate state agencies, and potential defendants prior to the commencement of suit, commencement of suit after clean-up has been concluded does not render the notice provision "gratuitous," as petitioners contend. The required notice still serves valuable functions even where, as here, plaintiff has eliminated the hazard. First, it serves the purpose of assisting EPA to

fulfill its statutory obligations to inventory and monitor hazardous waste sites and to collect and disseminate information about the location of those sites. Second, the notice promotes settlement prior to a resort to the courts.

In addition, RCRA's object and purposes are best served by respondent's construction of the statute. RCRA's dual purposes are encouraging resource recovery and protecting against contamination. Certainly, these purposes are far better served by a reading of the statute that facilitates immediate clean-up by providing a financial incentive for it. In contrast, the reading urged by petitioners and the government is perverse because it encourages potential plaintiffs to postpone clean-up for the purpose of preserving their cause of action under RCRA thereby heightening the risk of irreparable injury to the public health and the environment .

The construction of the statute urged by respondent and adopted by the Ninth Circuit does not interfere with the cost recovery scheme set forth in CERCLA, 42 U.S.C. §§ 9601 *et seq*. CERCLA was enacted in 1980. Congress could easily have eliminated the government's enforcement authority under RCRA's Section 7003 at that time. And, by the same token, Congress could easily have chosen not to enact Section 7002(a)(1)(B), providing the authority for citizen enforcement in 1984. Congress instead decided that the remedial purposes of the two statutes would best be served by allowing the CERCLA and RCRA enforcement provisions to co-exist. And this legislative judgment is embodied in CERCLA's "savings provision," which explicitly and explicitly refutes petitioners' contention that CERCLA provides a basis for narrowly reading petitioners' obligations or liabilities under RCRA.

ARGUMENT

I. SECTION 7002(A) OF THE RESOURCE CONSERVATION AND RECOVERY ACT AUTHORIZES FEDERAL DISTRICT COURTS TO EXERCISE THEIR FULL INHERENT EQUITABLE JURISDICTION, INCLUDING THE AWARDING OF RESTITUTIONARY RELIEF, AND DOES NOT EVINCE A CLEAR CONGRESSIONAL INTENT TO LIMIT THE COURTS TO INJUNCTIVE REMEDIES

A. Federal Courts, When Interpreting Statutes That Provide For Equitable Relief, Are Presumed To Have Jurisdiction To Grant The Full Range of Equitable Relief-- Absent Some Clear Congressional Directive Or Inescapable Statutory Inference To The Contrary. This Presumption Applies Here And Its Application Is Buttressed By The Statutory Language.

Petitioners advance a remarkable claim. They contend that in enacting Section 7002(a) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a), Congress intended to preclude federal district courts from exercising their full equitable discretion, which this Court has long held includes the awarding of restitutionary relief in necessary and appropriate circumstances. In direct opposition to petitioners' claim is this Court's settled precedent that Congress should be presumed not to have so limited the federal court's authority unless there exists clear congressional intent to the contrary. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 71 (1992). Because petitioners offer no evidence of such contrary congressional intent, and there is none, the judgment of the Ninth Circuit should be affirmed and the case remanded to the lower courts for consideration of whether restitutionary relief is warranted in the circumstances

of this case.

When Congress creates a private right of action, the "traditional presumption" is that Congress intends for courts to be able to award "all appropriate relief" in any lawsuit brought pursuant to that cause of action. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 71 (1992). The *Franklin* opinion makes clear that the scope of relief appropriate in any particular case turns on the nature and degree of both the plaintiff's injury and the statutory interests being vindicated by the lawsuit. The presumption is that Congress intended for courts to be capable of fully redressing both that injury and those statutory interests. Because, moreover, of the anomalies that would otherwise be created, the Court finds that presumption rebutted only in the face of a "clear directive to the contrary by Congress." *Id.* at 70-71.

The rationale for that presumption is two-fold. First, it is fair to assume that when Congress invokes the jurisdiction of the federal courts, Congress does not intend to disturb the inherent authority and expertise of those courts in fashioning and awarding judicial remedies. Second, it is likewise fair to assume that Congress intended to provide successful plaintiffs with complete relief.

The impact of the presumption is considerable. Congressional intent remains, as always, the ultimate touchstone for determining the remedies available to a plaintiff maintaining a statutory cause of action. Yet, congressional silence regarding the appropriate remedial scope of the federal district courts is tantamount to congressional intent to invoke the courts' full inherent remedial authority. Because, moreover, only the most "clear directive to the contrary by Congress" is capable of overcoming that presumption, rarely should any indicia of congressional intent less weighty than the plain meaning of

the statutory language be capable of defeating the presumption.

This Court has made especially clear its commitment to that presumption in considering the scope of the federal judiciary's equitable jurisdiction. The Court has repeatedly admonished the lower courts that they should presume that they retain their full equitable jurisdiction. That jurisdiction extends in a particular case both to the scope of equitable relief available and to the factors that must be considered in determining whether to award equitable relief at all. *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-314 (1982); *Porter v. Warner Holding Co.*, 328 US. 395, 398 (1946); *Hecht v. Bowles*, 321 U.S. 321, 329 (1944).

To be sure, "Congress may intervene and guide or control the exercise of the courts' [equitable] discretion," but this Court had made clear that it will "not lightly assume that Congress has intended to depart from established principles." *Romero-Barcelo*, 456 U.S. at 313 (citations omitted). "'[C]omprehensiveness of * * * equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.'" *Id.* (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *see also* 456 U.S. at 322 (Stevens, J., dissenting) ("Unless Congress specifically commands a particular form of relief, the question of remedy remains subject to a court's equitable discretion.").

Of particular significance to the instant case, the "full scope of that jurisdiction" plainly extends to the awarding of restitutionary relief. Restitutionary relief is, of course, a

remedy "traditionally viewed as 'equitable.'" *Mertens v. Hewitt Assoc.*, __ U.S. __, 113 S.Ct. 2063, 2068 (1993). And, it is far too late for petitioners to claim that the presumption favoring the federal judiciary's retention of its full equitable jurisdiction does not somehow extend to restitutionary remedies. For, in fact, the leading case applying that presumption, *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), did so a half century ago in recognizing the availability of the very kind of restitutionary remedy petitioners purport to deny the courts authority to award in the case now before the Court.

In *Porter*, this court construed the Emergency Price Control Act of 1942, a statute that provided, in pertinent part, that the Administrator of the Office of Price Administration, when he determined that any person had engaged or was about to engage in practice which would constitute a violation of certain provisions of the act, could "*make application to the appropriate court for an order enjoining such acts or practices*" or "*for an order enforcing compliance with such provision*". The central issue in *Porter* was whether the quoted language authorized the district courts to grant restitutionary relief (in this case, the repayment of excessive rents changed in violation of the act). This Court concluded that the act authorized the district court to award all appropriate equitable remedies, including restitution, writing:

> [T]he Administrator invoked the jurisdiction of the District Court to enjoin acts and practices made illegal by the Act and to enforce compliance with the Act. Such a jurisdiction is an equitable one. *Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction.* And since the public interest is involved in a proceeding of this nature,

> those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. [Citation.] Power is thereby resident in the District Court, in exercising this jurisdiction, "to do equity and to mould each decree to the necessities of the particular case." *Hecht v. Bowles*, 321 U.S. 321, 329, 64 S. Ct. 587, 592, 88 L. Ed. 754. . . .

Porter, 328 U.S. at 397-98.

Porter also sets forth the standard by which to consider the merits of any claim that restitutionary relief is not part of the court's traditional equitable jurisdiction in a particular cause of action. "'The great principles of equity, securing complete justice, should not be yielded to light inference or doubtful construction.'" *Porter*, 328 U.S. at 398 (quoting *Brown v. Swann*, 35 U.S. 497, 503 (1836).

> [T]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. *Unless a statute in so many words or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied*. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction."

Porter, 328 U.S. at 398 (citations omitted).

An approach to statutory construction identical to the one taken in *Porter* was taken by this Court in *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288 (1960). In *Mitchell*, the issue was similar to that in *Porter*: did the district courts have jurisdiction, under the Fair Labor Standards Act, to order reimbursement of wages lost as a result of a firing in

violation of the act when the act expressly authorized injunctive relief but made no mention of other equitable remedies? The court of appeals in *Mitchell* had ruled that it had no jurisdiction to issue an order for reimbursement of back pay because such jurisdiction, in its view, "must be expressly conferred by an act of Congress or be necessarily implied from a Congressional enactment." Justice Harlan, writing for the Court, relied upon the above-quoted language from the *Porter* case in finding the court of appeals' construction "mistaken". The *Mitchell* opinion not only adopted the reasoning of *Porter* that the full range of equitable remedies is available to the federal courts absent an expressed congressional intent to the contrary but elaborated upon it:

> When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in the light of statutory purposes. As this court long ago recognized, "there is inherent in the Courts of Equity a jurisdiction to *** give effect to the policy of the legislature. " *Clark v. Smith* 13 Pet. 195, 203, 10 L. Ed. 123.

361 U.S. at 291-92.

Forty-four years after *Porter*, this Court applied *Porter's* approach to statutory construction in *California v. American Stores Co.*, 495 U.S. 271 (1990). In *American Stores*, the question was whether Section 16 of the Clayton Act, which specifically authorizes injunctive relief for violations of the act, authorizes an order for stock divestiture after completion of an anti-competitive merger. The Court held that divestiture was an appropriate remedy, approving the reasoning of the First Circuit in a similar case that divestiture

is available under Section 16 because that Section "states no restrictions or exceptions to the form of injunctive relief a private plaintiff may seek" and because "the statutory language indicates Congress' intention that traditional principles of equity govern the grant of injunctive relief. 495 U.S. at 282-84.

B. Petitioners Have Not Overcome The Presumption In Favor Of Full Equitable Jurisdiction

The *Porter-Franklin* line of cases leads to the inescapable conclusion that over the last fifty years this Court has consistently maintained the position that the federal judiciary's full equitable jurisdiction is presumed to exist in enforcing statutes in the absence of clear congressional directives to the contrary. Petitioners make not even the barest effort to overcome the applicable presumption in favor of restitutionary relief. They instead simply ignore the existence of the presumption altogether. No doubt, however, petitioners do so for good reason. The plain meaning of Section 7002(a) of RCRA comes nowhere close to providing a "clear * * * congressional command" denying the federal courts authority to award restitutionary relief in an appropriate case. Quite the opposite is true. Section 7002(a)'s plain import is that federal courts possess just such authority pursuant to that statutory provision.

Section 7002(a) provides a district court with "jurisdiction * * * to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both * * *." 42 U.S.C. § 6972(a).

We do not here dispute petitioners' claim that the relevant

language is sufficient to preclude the district courts from awarding successful plaintiffs money damages at law for any injuries they may suffer as a result of an endangerment. But, unlike petitioners, we do not agree that the language likewise precludes an awarding of restitutionary relief. Petitioners' contrary view suffers from two fatal flaws.

First, and most importantly, petitioners wrongly assume that the possibility of restitutionary relief is not fairly embraced by the language "to order such person to take such other action as may be necessary." Restitutionary relief is a kind of equitable relief that is "order[ed]." And, as in this case, restitutionary relief may be "necessary" in order to disgorge the enrichment unjustly being enjoyed by petitioners who did not have to pay any of the cleanup expenses unfairly absorbed by respondent alone. *Cf.* Restatement of Law, Restitution, § 76 (1937) ("A person who, in whole or in part, has discharged a duty owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct."); *see generally* Douglas Laycock, Modern American Remedies -- Cases and Materials, 646 (2d ed. 1994); Douglas Laycock, *The Scope and Significance of Restitution*, 67 Tex. L. Rev. 1277 (1989); Saul Levmore, *Explaining Restitution,* 71 Va. L. Rev. 65 (1985).

Section 7002(a)(1)(B) nowhere states, notwithstanding petitioners' contrary claim, that an order is only "necessary" to the extent that it redresses an ongoing environmental hazard. Congress no doubt could have used the "necessary" modifier in such a fashion. But it did not. Congress instead invoked the "necessary" modifier in the most traditional way in the remedial context, thereby allowing the courts to decide for themselves whether restitutionary relief was appropriate and "necessary" in light of the particular facts of a case.

Congress did not erect an insuperable barrier to the court's exercise of its equitable discretion in considering the merits of a claim for restitutionary relief under Section 7002(a).

This Court's decision in *Porter* eliminates any possible doubt regarding the significance of Section 7002(a)'s statutory language. The language at issue in this case is virtually identical to the statutory language at issue in *Porter*, which this Court held authorized the granting of restitutionary relief. Applying the presumption previously discussed, this Court held that the phrase "other order" fairly embraced an order for restitutionary relief. See 328 U.S. at 399 ("The term 'other order' contemplates a remedy other than that of an injunction or restraining order, a remedy entered in the exercise of the District Court's equitable discretion.").

For similar reasons, Section 7002(a)'s command that a district court may "order such person to take such other action as may be necessary" fairly embraces an order for restitutionary relief. Indeed, because this Court's decision in *Porter* was settled law at the time of congressional drafting and enactment of Section 7002(a), this case presents an even more compelling instance than did *Porter* for concluding that Congress intended to preserve the federal district court's full equitable jurisdiction, including the possibility of awarding restitutionary relief when such an order "is appropriate and necessary to enforce compliance with the Act and to give effect to its purposes." 398 U.S. at 400.

The second flaw in petitioners' reasoning is their apparent assumption that restitutionary relief must be precluded because Section 7002(a) does not provide for money damages at law. Petitioners, however, misapprehend the relationship between restitutionary relief sounding in equity and money damages at law.

Although the boundary within restitution between law and equity is imprecise at best because of their parallel and overlapping histories (*see* Restatement of Law, Restitution, 4-10 (1937); Laycock, *The Scope and Significance of Restitution*, 67 Tex. L. Rev. at 1278-1283), clearly distinct sets of principles govern the availability of restitutionary remedies in equity and money damages at law. Although both may require the payment of money, their respective measures as well as the criteria for their availability are fundamentally different. Damages at law are not analogous to equitable restitutionary relief. *See Tull v. United States*, 481 U.S. 412, 423-24 (1987); *see Chauffeurs, Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990).

Once again, this Court's ruling in *Porter* is revealing. In *Porter*, the Court rejected the argument that "other order" should not be construed to authorize restitutionary relief because Congress had otherwise in the relevant legislative enactment provided an explicit, separate provision for money damages. The Court explained the difference between restitution in equity and damages at law and how, for that reason, a congressional determination with regard to the availability of the latter in one provision did not dictate the result in a distinct provision. *See* 398 U.S. at 400-402.

The same reasoning applies here. Whether Congress created a private right of action for money damages has no immediate bearing on the distinct question whether Section 7002(a) permits federal district courts in exercising their traditional equitable discretionary jurisdiction to include an award of restitutionary relief.

C. Petitioners Misconstrue Established Precedent That Has Granted Restitutionary Relief In Environmental Cases And Rejected The Claim That Such Relief Is Tantamount To An Award Of Damages

Decisions by this court in *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 204-205 (1967) and *Tull v. United States*, 481 U.S. 412, 423 (1987) have addressed the restitution-damages distinction in the context of environmental clean-up. In *Wyandotte*, the government sought and received reimbursement from the owners of a barge for the cost of removing barge wreckage which had contaminated a navigable waterway with chlorine in violation of the Rivers and Harbors Appropriation Act. The opinion held that the government, by supplying a service to the defendants necessary to protect the public health, was *entitled to restitution* for the monies it had expended. And in *Tull*, this court recognized that civil penalties assessable under the Clean Water Act, 33 U.S.C. section 1251 *et seq.*, are legal and punitive in nature in contrast to restitutionary remedies which aim at restoring the parties to the status they had prior to defendant's commission of an unlawful act.

In addition to the authorities cited above, much case law has been generated in the last decade on the issue of whether actions to recover environmental response costs under various environmental statutes including RCRA, the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601, *et seq.*, ("CERCLA"), and the Federal Water Pollution Control Act ("FWPCA") are legal or equitable in nature. The overwhelming majority of courts to consider the question deemed such actions to be actions for *equitable restitution*. *United States v. P/B STCO 213*, 756 F.2d 364, 366 (5th Cir., 1985) exemplifies the reasoning of these cases: ("The FWPCA imposes a primary

duty on the polluter to clean up. Upon the polluter's non-performance of that duty, the FWPCA authorizes the United States to clean up and thereafter to recover its costs. *Thus, the United States does not assert a right to compensatory damages based on the polluter's breach of duty not to pollute. Rather the United States asserts a right to restitution based on the costs it incurred in performing the polluter's duty to clean up.*") (Emphasis supplied.) *Accord*, *U.S. v. Mottolo*, 605 F. Supp. 898, 912, 913 (D.N.H. 1985) (citing seven cases that characterize recovery of response costs under CERCLA as equitable relief); *United States v. Price*, *supra* 688 F.2d at 213-214; *United States v. Conservation Chemical Co.*, 619 F. Supp. 162, 201 (W.D.Mo. 1985) and *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 749 (8th Cir. 1986) (all holding reimbursement of abatement costs under RCRA to be equitable relief in the form of restitution). *See also Bayless Inv. & Trading Co. v. Chevron U.S.A. Inc.*, No. CIV 93-0704 PHX PGR, 1994 U.S.Dist.LEXIS 12190 (D.Ariz.1994) (allowing restitution as a remedy under Section 7002(a)(1)(B) based on its power to award a mandatory injunction requiring the expenditure of money).

In asserting that an award of restitution for environmental response costs under RCRA is, in reality, an award of damages beyond the jurisdiction of the district court, petitioners ignore the substantial body of law characterizing reimbursement of environmental response costs as restitutionary in nature and rely chiefly on this Court's decisions in *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n.*, 453 U.S. 1 (1981) and *Cort v. Ash*, 422 U.S. 66, (1975). *Sea Clammers* admonishes that "it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." 453 U.S. at 14-15.

In *Sea Clammers*, the plaintiffs sought relief that their complaint alleged to be "damages" pursuant to certain provisions of the FWPCA. The plaintiffs were commercial fishermen whose complaint, in addition to the traditional equitable remedies of injunction and declaratory judgment, prayed for $250 million in compensatory and an additional $250 million in punitive damages. The compensatory and punitive damages purportedly were warranted by the defendants' alleged conduct in dumping sewage into the Atlantic Ocean in violation of the act. The dumping, in turn, was alleged to have caused environmental changes which decimated the population of certain fish and shellfish off the New England coast, thereby drastically reducing plaintiffs' present and future livelihood. This Court found that the FWPCA--although it included a citizen suit provision--neither explicitly nor implicitly sanctioned an award of compensatory and punitive damages.

Sea Clammers is not the controlling precedent in this case for the simple reason that the *Sea Clammers* plaintiffs, unlike respondent, truly were seeking "damages"--a term this Court has defined to mean relief "intended to provide a victim with monetary *compensation for an injury to his person, property, or reputation*" and has distinguished from equitable actions for specific relief such as restitutionary awards of back pay. *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988). In contrast, respondent seeks no compensation for loss of income or diminution of its earning power and no punitive damage award to deter future unlawful conduct. It seeks instead only to recover monies paid in the course of discharging a legal duty owed by petitioners to remediate the property allegedly contaminated as a result of their negligence.

Cort v. Ash is also inapplicable to this case. In *Cort*, this Court fashioned a four-part test for the implication of a

private right of action pursuant to a statute that did not expressly provide for one. The four factors identified by *Cort* as necessary for the implication of a private right of action are: the plaintiff must be among the class of people for whose special benefit the statute was enacted; there must be explicit or implicit congressional intent to provide a private right of action under the statute; the underlying purpose and statutory scheme must militate in favor of the implication of such a right; and the cause of action must not be one traditionally relegated to state law. More recently, this Court has modified the *Cort* test by holding that its central focus must be the determination of legislative intent. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76, (1979).

Cort does not furnish any guidance in this case because RCRA -- far from being silent on the existence of a private right of action -- *expressly provides for one* in section 7002(a)(1)(B). The question being addressed in this case is not, as it was in *Cort*, the existence of a private right of action but rather the scope of the federal courts' jurisdiction to fashion an equitable remedy. As discussed above, this traditionally broad remedial jurisdiction in equity is presumed to exist and may not be curtailed absent an unambiguous indication of congressional intent to do so. Accordingly, petitioners' contention that *Cort* bars restitutionary relief under RCRA is without merit.

D. The Legislative History Of The Statute Is At Variance With The Statutory Text And Is Ambiguous. Therefore, The Legislative History Cannot Guide This Court's Determination On The Availability Of Restitution For Past Response Costs Under Section 7002(a)(1)(B).

Petitioners rely heavily on excerpts from RCRA's legislative history, which they contend demonstrate Congress' intent to limit the equitable remedies available under section 7002(a)(1)(B) to injunctive relief. The particular portions of the legislative history cited consist of a statement in the 1984 House Report to the effect that Section 7002 "confers on citizens a limited right . . . to sue to abate an imminent and substantial endangerment"[3] and another statement in the same report identifying the goal of this section as "the prompt abatement of imminent and substantial endangerments."[4]

Petitioners also assert that a controversy over the permissibility of pendent state law claims that arose between minority House committee members and majority members sheds light on the scope of equitable remedies afforded by the statute. The Minority Report opposed giving district courts jurisdiction to hear pendent state claims in conjunction with RCRA claims under section 7002 on the grounds that any such grant of pendent jurisdiction would require "federal judges . . . to decide cumbersome questions of state law nuisance, trespass, and personal and property damage" and thereby, in the view of the minority members, interfere with those judges' ability to focus on the abatement of imminent

---

[3] H.R. Rep. No. 198, 98th Cong., 2d Sess. (1984) *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612.

[4] *Id.*

hazards. The committee majority, while rejecting any limitation on pendent jurisdiction, stated in its Majority Report that the federal courts were to "exercise their discretion concerning pendent jurisdiction in a way that will not frustrate or delay the primary goal of this provision, namely the prompt abatement of imminent and substantial endangerments."[5]

The snippets of legislative history presented by petitioners in support of their interpretation of the statute are not only inconclusive on the scope of the district courts' jurisdiction to award restitutionary relief, they are not even illuminating on that point. To begin with, there are other portions of the legislative history not cited or analyzed by petitioners that afford strong support to the Ninth Circuit's construction of the statute. For example, the legislative history regarding the citizen suit provision explicitly states: "The Committee believes this expansion of the citizen suits provision will complement, rather than conflict with, the Administrator's efforts to eliminate threats to public health and the environment, particularly when the Government is unable to take action because of inadequate resources."[6] The primary goal of Section 7002(a)(1)(B) was stated to be "the prompt abatement of imminent and substantial endangerments."[7]

Further, a 1979 House Committee Print, H. R. Committee Print No. 96-IFC 31, 96th Cong., 1st Sess. at 32 (1979) quoted in *United States v. Price*, *supra*, 688 F.2d at

---

[5] 1984 U.S.C.C.A.N. at 53.

[6] H.R. Rep. No. 198, 98th Cong., 2d Sess., pt. I and II, at 53 (May 17 & June 9, 1983), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612.

[7] *Id.*

213, states that RCRA Section 6973, the provision that authorizes government actions to combat imminent and substantial endangerments, was intended to confer "overriding authority to respond to situations involving a substantial endangerment to health or the environment". This language can certainly to be read to mean that that "overriding authority" embraces jurisdiction to award the full range of equitable relief. Thus, contrary to petitioners' assertions, the legislative history does not evidence clear congressional intent to limit the traditional equitable powers of federal courts to grants of injunctive relief.

Moreover, even if portions of legislative history relied upon by petitioners are *assumed* to evidence such clear congressional intent to preclude restitutionary relief, which they do not, *that intent is nowhere reflected in the language of the statute enacted by Congress*, and thus are wholly irrelevant to the Court's inquiry. *See City of Chicago v. Environmental Defense Fund*, ___ U.S.___, 114 S. Ct. 1588, 1593 (1993) ("*But it is the statute and not the committee report which is the authoritative expression of the law.* . . . Why should we, then, rely upon a single word in a committee report that did not result in legislation? Simply put, we shouldn't.") (Emphasis supplied). *See also, Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 470-472 (1989) (Kennedy, J., concurring) ("[It] does not foster a democratic exegesis for this Court to rummage through unauthoritative materials to consult the spirit of the legislation in order to discover an alternative interpretation of the statute with which the Court is more comfortable.")

In short, the references in the legislative history excerpted by petitioners to citizen plaintiffs' "limited right" to bring suit for abatement -- viewed in light of the longstanding body of law developed by this Court protecting the federal judiciary's equitable jurisdiction -- can easily be read as

endorsing full equitable jurisdiction and foreclosing legal claims for *damages*.

By the same token, the exchanges between the majority and minority committee members concerning the availability of pendent jurisdiction are also easily susceptible to an interpretation supportive of the Ninth Circuit's construction of the statute. The limitations on pendent jurisdiction proposed by the minority members are not reflected in the enacted legislation and therefore may be considered to have been rejected by Congress altogether. Or, in one possible reading, they may show an intent to foreclose federal judicial involvement in the calculation of damages. On the other hand, a second and equally plausible interpretation of these words is that they indicate congressional intent to assure that pretrial hearings and trials are conducted so as to provide injunctive relief as quickly as possible--with remaining issues to be adjudicated after endangerments have been abated.

Thus, the legislative history -- contrary to petitioners' assertions -- is fraught with ambiguity and in fact may be construed to support the Ninth Circuit's opinion. Moreover, the excerpts from the legislative history relied upon by petitioners actually conflict with the plain meaning of the statutory text. The legislative history viewed as a whole in no way provides a clear indication that Congress, when it enacted Section 7002, understood and intended that this provision overcome the presumption that the federal courts should not exercise the broadest scope of equity jurisdiction, and could authorize only injunctive relief. Therefore, there is no reason that this Court should treat it as an authoritative guide to the meaning of that section.

II. RCRA SECTION 7002(A)(1)(B) DOES NOT CONDITION THE AVAILABILITY OF A CITIZEN SUIT ON THE EXISTENCE OF AN IMMINENT AND SUBSTANTIAL ENDANGERMENT AT THE TIME THAT THE LAWSUIT IS FILED

The United States agrees with respondent that Section 7002(a)(1)(B) permits federal district courts to grant restitutionary relief. *See* U.S. Amicus Br. at 22-28. The federal government nonetheless shares petitioners' view that even if restitutionary relief is generally available, Section 7002(a)(1)(B) creates no citizen suit cause of action if there is no imminent and substantial endangerment at the time the lawsuit if filed. Hence, according to both petitioners and the United States, a citizen plaintiff may obtain relief under Section 7002(a)(1)(B) if she makes *no effort* to clean up a site before seeking filing suit, or even if she makes *a partial effort*, so long as that effort falls short of that necessary to eliminate the ongoing hazards faced by the public and the natural environment. But, they contend, should the plaintiff citizen actually *eliminate* that hazard altogether prior to filing suit, she is *denied* all federal remedy.

Because Section 7002(a)(1)(B)'s statutory language does not unambiguously require such a perverse reading of congressional intent -- and we can imagine no other circumstance possibly appropriate for the Court acquiescing in such a construction of Section 7002(a)(1)(B) -- the Court should reject petitioners' and the federal government's proffered view. Even seasoned with seven herbs and spices, their argument is difficult to swallow. The Ninth Circuit's far more sensible reading of congressional intent, which would extend the Section 7002(a)(1)(B) cause of action to the most deserving of possible citizen plaintiffs, should be upheld.

A. Section 7002(a)(1)(B)'s Express Terms Reflect Congressional Intent To Extend The Citizen Suit Provision To Past Conduct And Their Effects Rather Than To Limit The Scope Of The Provision To Imminent And Substantial Endangerments Existing At The Time That A Lawsuit Is Filed

Neither petitioners nor the United States denies that Section 7002(a)(1)(B) applies retrospectively. Nor could they. Its retrospective dimension is explicit and repeated. Section 7002(a)(1)(B) allows lawsuits against any "*past or present* generator, *past or present* transporter, or *past or present* owner or operator of a treatment, storage, or disposal facility." Each of these past and present entities falls within Section 7002(a)(1)(B)'s ambit to the extent, moreover, that it "*has contributed*" or "is contributing" to the "*past and present* handling, storage, treatment, transportation, or disposal of any solid waste."[8]

---

[8] The relevant portion of Section 7002(a)(1)(B) provides:

> (a) * * * any person may commence a civil action on is own behalf --
>
> (1) * * *
>
> (B) against any person, including the United States * * * and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

Congress could hardly have been plainer in its resolve to ensure that Section 7002(a)(1)(B) would not be misconstrued as applying only prospectively. The repeated references to "past or present" make plain that Congress did not intend to confine Section 7002(a)(1)(B) to the present or to the future. Wholly past activities and their past consequences are within the explicit, indeed emphasized, scope of the citizen suit provision. Indeed, in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 57 n.2 (1987), a case much relied upon by Petitioners and the United States, this Court specifically cited Section 7002(a)(1)(B) as an example of a statutory provision in which "Congress has demonstrated . . . that it knows how to avoid this [limitation to prospective application] *by using language that specifically targets wholly past violations*." (emphasis added).

Contrary to the United States' claim, the statutory language does not "unambiguously indicate[]" that a citizen suit must be "in response to *specified activities* that 'may present an imminent and substantial endangerment to health or the environment.'" U.S. Amicus Br. 11 (emphasis added) (quoting 42 U.S.C. § 6972(a)(1)(B)). However, the references to "past and present" in the statute are not limited to activities. They apply to conditions as well. "Disposal" is defined to mean, *inter alia*, "leaking," (42 U.S.C. § 6903(3)), which does not require proof of any conduct, and describes as well "a physical state" or "an occurrence." *See, e.g., United States v. Waste Industries*, 734 F.2d 159, 164-65 (4th Cir. 1984). Nor are petitioners any more correct in opining that "the same present tense language allows suits only for *conditions* 'which may present an imminent and substantial endangerment.'" Pet. Br. 17 (emphasis added)

(quoting 42 U.S.C. § 6972(a)(1)(B) (emphasis omitted)).[9]

Petitioners and the United States rely for their claim that an imminent and substantial endangerment must nonetheless exist at the time that the lawsuit is filed on the fact that the reference to "imminent and substantial endangerment" in Section 7002(a)(1)(B) is preceded by the words "may present." See 42 U.S.C. § 6972(a)(1)(B) ("which may present an imminent and substantial endangerment to health or the environment."). They argue that because "may present" is written in the present (or possibly future) tense, no cause of action exists where any imminent and substantial endangerment that may have existed in the past no longer did at the time of the lawsuit's filing.

Petitioners interpretation rests, however, on a fundamental transgression of one of the most basic principles of statutory construction. All here agree that "the starting point for interpreting a statute is the language of the statute itself." *Hallstrom v. Tillamook County*, 493 U.S. 20, 25 (1989); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 56 (1987). But what both petitioners and the United States then sidestep by their seizure of the words "may present" is this Court's repeated admonition that the construction of any statutory phrase cannot be validly undertaken in isolation. "Statutory construction 'is a holistic endeavor.'" *U.S. National Bank of Oregon v. Independent Insurance Agencies*, __ U.S. __, 113 S.Ct. 2173, 2182 (1993) (quoting *United Savings Ass'n of Texas v. Timbers of Inwood Forest Ass'n, Ltd.*, 484 U.S.

---

[9] Petitioners also misquote Section 7002(a)(1)(B) on page 16 of their brief. That section refers to "any solid or hazardous waste *which* may present an imminent and substantial endangerment" and not to "any solid or hazardous waste *that* may present and imminent and substantial endangerment."

365, 371 (1988)). The Court must look to the "provisions of the whole law, and to its object and policy." *John Hancock Mutual v. Harris Trust & Savings Bank*, __ U.S. __, 114 S.Ct. 517, 523 (1993); *U.S. National Bank of Oregon v. Independent Insurance Agencies*, __ U.S. __, 113 S.Ct. at 2182; *Conroy v. Aniskoff*, __ U.S. __, 113 S.Ct. 1562, 1565 (1993); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 112 S.Ct. 570, 574 (1991); *Crandon v. United States*, 494 U.S. 152, 158 (1990); *Massachusetts v. Morash*, 490 U.S. 107, 115 (1990)).

The statutory phrase "which may present an imminent and substantial endangerment" does not unambiguously modify either certain "specified activities" or "conditions." Indeed, neither of those terms even appears in Section 7002(a)(1)(B). A more natural reading of the relevant statutory language is instead that the purpose of that "relative defining clause" is to "identif[y] the person or thing meant by limiting the denotation of the antecedent." Henry W. Fowler, *Dictionary of Modern English Usage*, 626 (2d ed. 1965). Here, the immediate antecedent is "any solid or hazardous waste."

Section 7002 is intended to apply only to narrow categories of "solid or hazardous waste" which have the potential of causing an imminent and substantial endangerment to health or the environment. The best reading of the meaning of the "may present" modifier, therefore, is to define this category of "solid or hazardous waste." The language, consistently with the section's overall emphasis on past or present activities, does not purport to describe when such an endangerment must have been or might in the future be, present. Only by conveniently ignoring the actual language immediately preceding the clause they purport to assign a plain meaning are petitioners and the United States able to support their opposing view.

The correctness of our view is reinforced by a subsequent clause in Section 7002(a). In describing the scope of judicial relief available under Section 7002(a)(1)(B), Section 7002(a) provides that the district court shall have jurisdiction "to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal *of any solid or hazardous waste referred to in paragraph (1)(B).*" 42 U.S.C. 6972(a). Here the statute quite plainly links the meaning of "solid or hazardous waste" for the purposes of Section 7002(a)(1)(B) to the earlier reference to those types of wastes that "may present an imminent and substantial endangerment." It is not the activities that must present the endangerment at some particular time. The activities may, as in the prior portion of the law, occur in the "past or present."[10]

Finally, there is no merit in petitioners' suggestion that Section 7002's notice provision demonstrates congressional intent to confine Section 7002(a)(1)(B) to endangerments existing at the time of the filing of the lawsuit. That notice provision, found at Section 7002(b)(2)(A), requires that, prior to the filing of a citizen suit, the plaintiff provide ninety

---

[10] Congress similarly drafted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601 *et seq.* Section 104 of CERCLA authorizes the President to undertake cleanup activities whenever there is a release or substantial threat of release into the environment of either a "hazardous substance" (42 U.S.C. § 9604(a)(1)(A)) or a "pollutant or contaminant which may present an imminent or substantial endangerment to the public health or welfare" (42 U.S.C. § 9604(a)(1)(B)). Here, too, the imminent and substantial endangerment clause, including "may present," serves only to define a type of pollutant or contaminant rather than to dictate when certain hazards must be present.

days' notice to the EPA Administrator, the state in which the endangerment occurred, and "any person alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in subsection (a)(1)(B)". Petitioners contend that permitting a post-clean-up action strips the notice provision of its chief functions which are: to permit the alleged violator the opportunity to address the problem and to allow government agencies the opportunity to take the lead in enforcing environmental regulations. Pet. Br. 18-21.

Although the primary purpose of the notice provision may be to allow potential defendants to undertake clean-up on their own -- or, failing that, through a government-compelled administrative proceeding -- that does not suggest that Section 7002(a)(1)(B)'s exclusive scope is present endangerments. The notice provision serves a valuable function even where, as in this case, plaintiff has eliminated the hazard. As the Ninth Circuit noted in its opinion below (Pet. App. A8), a post-abatement case such as this one serves the valuable function of notifying EPA and the state that contamination occurred and was cured. This type of information is necessary for the EPA in particular to fulfill its statutory obligations under RCRA of inventorying contaminated sites whose existence is reported to EPA by the states (42 U.S.C. § 6933) and coordinating, collecting and disseminating information about, *inter alia*, the location of sites containing solid and hazardous waste (42 U.S.C. § 6983). In addition, notice prior to the filing of a RCRA restitution action promotes the possibility of settlement prior to the filing of a lawsuit.

B. RCRA's Stated National Policy "To Minimize The Present And Future Threat To Human Health And The Environment" Is Served By Permitting Citizens To Reduce And Eliminate Imminent and Substantial Endangerments Prior To The Filing Of A Lawsuit

Congress declared in RCRA a "national policy of the United States" that hazardous waste "should be treated, stored, or disposed of *so as to minimize the present and future threat to human health and environment.*" 42 U.S.C. § 6902(b) (emphasis added). That policy provides an overarching principle relevant to the construction of any terms enacted by Congress within that statutory context, including Section 7002(a)(1)(B). There is no room within that principle for the unduly narrow reading of Section 7002(a)(1)(B) proffered by both petitioners and the United States.

Hazardous waste sites presenting imminent and substantial endangerments are not static in character. The hazards they present to human health and the environment increase inexorably and dramatically over time as do the costs of their remediation. The hazardous constituents within such wastes, when released, can spread in an uncontrolled manner throughout an ecosystem. In addition, the longer the waste remained uncontrolled, the greater the likelihood of accidental exposures. For these reasons, minimization of the threats posed by hazardous wastes tends to favor early, rather than delayed cleanup. Delay means greater risks of exposure and greater cleanup costs.

Petitioners' proposed construction of Section 7002(a)(1)(B), however, would promote just such delay. Indeed, their reading would create a perverse incentive against a citizen plaintiff's ever undertaking any cleanup on

his or her own initiative. The citizen plaintiff who sought to promote RCRA's stated policy "to minimize the present and future threat to human health and environment" by reducing and eliminating the imminent and substantial endangerment would be denied any relief under petitioners' view. Only the plaintiff who delayed any cleanup efforts, and thereby risked exacerbating the existing hazards, would be able to bring a claim for relief under Section 7002(a)(1)(B).

This Court should require the clearest indicia of congressional intent prior to supposing that Congress intended such an untenable result. The statutory language, however, certainly does not compel such a reading. And RCRA's stated "national policy" flatly contradicts it.[11]

---

[11] Petitioners mistakenly rely on this Court's decision in *Gwaltney of Smithfield v. Chesapeake Bay Foundation , Ltd.*, 484 U.S. 49 (1987). To be sure, this Court in *Gwaltney* held that an environmental citizen suit provision did not apply to past violations. But this Court was not construing Section 7002(a)(1)(B) of RCRA. The Court was construing an entirely different statutory provision in an entirely different environmental law: Section 505 of the Clean Water Act, 33 U.S.C. 1365 ("CWA"). Section 7002(a)(1)(B) is, moreover, entirely unique. It has no counterpart in the CWA. And the CWA does not even contain remotely similar language. The CWA's citizen suit provision does not expressly apply to "past or present" conduct, but requires instead that a facility be "in violation" of a distinct statutory or regulatory requirement of the Act. By contrast, Section 7002(a)(1)(B) does not include such "in violation" language; nor does it even require a plaintiff to prove any violation whatever of a distinct statutory or regulatory requirement. Its purpose and scope are entirely different. Any comparison, therefore, between the scope of the CWA's citizen suit provision and that contained in RCRA Section 7002(a)(1)(B) is wholly inapt.

C. The Relevant Legislative History Does Not Support Petitioners' Crabbed Reading Of Section 7002(a)(1)(B)

This Court has long debated the clarity of statutory language necessary for the Court to uphold a reading of congressional intent that the Court might otherwise believe expresses unwise, illogical, or even somewhat absurd policies. *See, e.g., Public Citizen v. Department of Justice*, 491 U.S. 440, 454 (1989); *Green v. Bock Laundry Machine*, 490 U.S. 504, 510 (1989); *Church of Holy Trinity v. United States*, 143 U.S. 457, 459 (1892). Here, however, petitioners find their primary support for such an absurd reading not in statutory language, but in snippets of legislative history. On no occasion has this Court ever suggested that legislative history is enough to sustain what the statute's expressly stated policies would otherwise indicate is an untenable and perverse reading of congressional intent. Yet, that is precisely what petitioners attempt to do in this case.

Even assuming, however, that legislative history could theoretically muster the necessary support, petitioners fail to do so here. None of the legislative history excerpts upon which they rely (Pet. Br. 30-32) even purport to address the issue presented in this case, *i.e.*, whether an imminent and substantial endangerment must exist at the time that the suit is filed. Petitioners can at most point to isolated statements that seem to assume, without addressing the issue, that an imminent and substantial endangerment exists at the time the lawsuit is filed.

Petitioners' evidence of legislative history is therefore a far cry from compelling evidence of congressional intent that such an endangerment must continue to exist when the lawsuit is filed. It is just as likely that the lawmakers in

making these statements were merely contemplating the normal circumstance rather than dictating the *exclusive* circumstance when such a lawsuit would be required. In none of these various excerpts is there a blanket statement that the imminent and substantial endangerment must continue to exist at the time of the lawsuit.

An entirely plausible alternative reading of congressional intent, consistent with the legislative history, would be that the defendant's contribution to the risk of such an endangerment establishes liability under Section 7002(a)(1)(B), but once that liability is established, it is not eliminated by the plaintiff's own subsequent efforts to eliminate the hazard. Those efforts simply, as in this case, shift the nature of the equitable remedy "necessary" under Section 7002(A)(1)(B), rather than eliminate the cause of action altogether.

D. The Comprehensive Environmental Response, Compensation, And Liability Act, Does Not Require Limiting Section 7002(a)(1)(B) To Endangerments Existing At The Time Of The Lawsuit's Filing

Likewise lacking merit is petitioners' claim that the Court should reject the most natural reading of Section 7002(a)(1)(B) because that reading would interfere with the carefully structured scheme for private cost recovery actions Congress created in CERCLA. The short answer is that Congress deliberately decided to have CERCLA enforcement authorities and private citizen's enforcement authority under Section 7002 (and the government's closely related enforcement authority under Section 7003) *supplement* each other rather than *substitute* for each other. Congress could easily have eliminated Section 7003 when it enacted CERCLA in 1980, and not created Section 7002(a)(1)(B)

four years later in 1984. Congress instead decided that the remedial purposes of those two laws would best be served by allowing those two statutory causes of action to co-exist notwithstanding any possible coordination issues inevitably created.

Section 302 of CERCLA states in no uncertain terms that "[n]othing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law * * * with respect to releases of hazardous substances or other pollutants or contaminants." 42 U.S.C. § 9652. CERCLA's plain language, therefore, leaves absolutely no room for petitioners' contention that CERCLA provides a basis for narrowly reading petitioners' "obligations or liabilities * * * under [RCRA] * * * with respect to releases of hazardous substances or other pollutants or contaminants."

Petitioners also greatly exaggerate the potential for interference between RCRA and CERCLA. The fact that there is no express statute of limitations in RCRA is of no moment either in determining whether Congress intended in RCRA to provide a restitutionary remedy for clean-up costs already expended or in applying the citizen suit provisions. As the court of appeals below reasoned, the equitable defense of laches is available to defendants in Section 7002(a)(1)(B) when they choose to raise it. This Court long ago held in *Holmburg v. Albrecht*, 327 U.S. 392 , 395 (1946) that it was appropriate to allow laches to be raised as a defense in any case involving a "federally created right for which the sole remedy is in equity." *Holmburg* further explains that "'laches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced, -- an inequity founded upon some change in the condition or relations of the property or parties.'" 327 U.S. at 396 (citations omitted).

Accordingly, the laches defense would operate to protect defendants whose situation had materially changed in some way since their original involvement in contributing to the actions which presented the endangerment. Thus, to use the usual formulation, the defense of laches could be asserted if a defendant deemed herself prejudiced by the plaintiff's delay in bringing the action. In addition, case law exists that allows suits for environmental clean-up and applies federal statutes of limitations for quasi-contractual causes of action.[12]

Similarly, the absence in RCRA of the equivalent of the 29 pages of standards found in the Code of Federal Regulations governing the reimbursement of response costs under CERCLA neither evinces conclusive congressional intent to deny restitution of cleanup costs under RCRA nor makes it impossibly difficult for courts to fashion a restitutionary remedy under RCRA. Congress deliberately chose to allow for potentially overlapping remedies and the courts can avoid any undue interference through the exercise of their equitable discretion in the context of Section 7002(a)(1)(B) litigation.

In relying on general equitable principles to determine the appropriate amount of a restitutionary award under Section 7002(a)(1)(B), a district court could reasonably consult

---

[12] It should also be noted that environmental statutes other than RCRA lack statutes of limitation. Nevertheless, the federal courts have not allowed Congress' failure to specify limitations periods from enforcing claims for equitable restitution under those statutes. *See, e.g., United States v, P/B STCO 213, supra,* 756 F.2d 364 in which the Fifth Circuit applied 28 U.S.C. § 2415(a), which governs actions by the United States on contracts implied in fact or law to an action under the Clean Water Act for recovery of costs expended to remediate oil pollution in navigable waters.

relevant CERCLA guidance documents. The courts would also have the benefit of expert testimony on the appropriateness of particular expenditures, just as they do during CERCLA proceedings. Finally, courts have shown themselves completely capable of deciding which expenses are reimbursable in environmental costs recovery actions even absent the availability of such detailed standards.[13]

With respect to petitioners' claim that a restitutionary remedy under Section 7002(a)(1)(B) would undermine CERCLA's so-called "petroleum exclusion," their alarum is misguided. It is certainly correct that CERCLA Section 101(14) contains a limited exclusion for many petroleum products,[14] and that RCRA, by contrast, includes no comparable exclusion for hazardous petroleum wastes. However, petitioners cannot seriously dispute that petroleum can be, and is, regulated under RCRA either as a "solid" or as a "hazardous" waste. For example, used petroleum products and petroleum-contaminated media may be characterized as hazardous wastes under EPA's Toxicity Characteristic Rule and their clean-up ordered.[15] *See, e.g.*,

---

[13] *See United States v. P/B STCO 13*, *supra*, 756 F.2d 364.

[14] CERCLA's petroleum exclusion is not, however, absolute. Petroleum products which contain substances other than their indigenous components and common additives (in excess of their normal occurrence in petroleum) are not excluded from the reach of CERCLA. *See, e.g.*, *Mid Valley Bank v. North Valley Bank*, 764 F. Supp. 1377, 1384 (E.D. Cal. 1991) and *United States v. Alcan Aluminum Corp.*, 775 F. Supp. 531, 539 (C.D. Cal. 1991).

[15] 55 Fed. Reg. 11798. Application of the Toxicity Characteristic Rule is currently temporarily deferred by EPA with respect to media and debris contaminated with petroleum from underground storage tanks which are subject to the corrective action requirements of Subtitle I of RCRA. 40 C.F.R. § 261.4

Zands v. Nelson, 779 F. Supp. 1254, 1261-62 (S.D. Cal. 1991) (Petroleum waste is covered by RCRA). Likewise, petitioners can point to no authority, legislative or otherwise, that CERCLA's petroleum exclusion was intended to bar all federal claims arising from petroleum contamination, not merely those under CERCLA. And no anomalies flow from that purported discrepancy. Quite the opposite is true. The absence of overlap is likely a reason why Congress decided to permit both causes of action to persist, notwithstanding their potential to overlap in other areas.

In all events, the possibility of RCRA Section 7002(a)(1)(B) allowing a citizen suit regarding a waste not covered by CERCLA has no bearing on the issue currently before the Court. The same would be true for a suit for purely injunctive relief brought by a citizen plaintiff pursuant to Section 7002(a)(1)(B) or a suit by the government for identical relief pursuant to RCRA Section 7003. And the lower courts have uniformly upheld the propriety of RCRA enforcement actions in those circumstances. *See, e.g.*, *Agricultural Excess & Supplies Inc. v. ABD Tank & Pump Co.*, 878 F. Supp. 1091, 1095 (N.D. Ill. 1995); *Paper Recyling Co. v. Amoco Oil Co.*, 856 F. Supp. 671, 675 (N.D. Ga. 1993); *Zands v. Nelson*, 779 F. Supp. 1254, 1261-62 (S.D. Cal. 1991). CERCLA's petroleum exclusion eliminates the possibility of a suit for injunctive relief under CERCLA Section 106, 42 U.S.C. § 9606, yet such suits are permissible under RCRA Sections 7002 and 7003 because RCRA contains no such exclusion. Hence, petitioners' claim that CERCLA's petroleum exclusion requires a narrow reading of RCRA Section 7002 is a complete red herring.

(1992).

E. The United States Is Not Entitled To Any Judicial Deference Regarding The Meaning Of Section 7002(a)(1)(B)

The United States never claims that its view regarding the meaning of Section 7002(a)(1)(B) is entitled to any judicial deference. And rightly so. This Court has made clear that the principle of judicial deference to agency interpretations of statutory language does not apply "to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." *See Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988). And that is all that is before the Court: a litigating position.

Indeed, the United States amicus brief filed in this case is not even a distant relative of the kind of considered exercise of legislatively delegated lawmaking authority at issue in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The government's view is not reflected in any agency legislative rule promulgated with the opportunity for notice and comment pursuant to the Administrative Procedure Act. The United States is not even representing before this Court the views of the Environmental Protection Agency, which is the agency charged with administrating RCRA. It is instead a "Brief for the United States," which, by the government's own acknowledgement, represents the views of those federal agencies likely to be *defendants* in citizen suit actions brought pursuant to Section 7002(a)(1)(B). *See* U.S. Amicus Br. 2 ("The United States also has an interest in Section 7002(a)(1)(B) as a potential defendant in a citizen suit. Section 7002(a)(1)(b) expressly provides that 'the United States and any other governmental instrumentality or agency'

may be named as a defendant in a citizen action."). [16] The primary impetus for the government's brief -- and its conclusion that Section 7002(a)(1)(B) does not apply in the absence of an imminent and substantial endangerment at the time of the lawsuit's filing -- is a desire to minimize its own liability. The government has allowed, in effect, its liability concerns to overcome its enforcement interests.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

Daniel Romano
Counsel of Record

Sharon Corda
LAW OFFICE OF
DANIEL ROMANO
100 Wilshire Boulevard
Suite 1300
Santa Monica, California 90401
(310) 451-4959
Counsel For Respondent

Dated: December 8, 1995

---

[16] The United States has, moreover, good reason to be concerned about its potential exposure under Section 7002(a)(1)(B). The federal government is the single greatest source of hazardous waste contamination in the country. *See* Congressional Budget Office, Federal Liabilities under Hazardous Waste Laws, S. Doc. No. 95, 101st Cong., 2d Sess. (1990).

APPENDIX

§ 6972. Citizen suits

(a) In general

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf-

(1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may

occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.

(b) **Actions prohibited**

(1) No action may be commenced under subsection (a)(1)(A) of this section-

(A) prior to 60 days after the plaintiff has given notice of the violation to-

(i) the Administrator;

(ii) the State in which the alleged violation occurs; and

(iii) to any alleged violator of such permit, standard, regulation, condition, requirement, prohibition, or order,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter; or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order.

In any action under subsection (a)(1)(A) of this section in a court of the United States, any person may intervene as a matter of right.

(2)(A) No action may be commenced under subsection (a)(1)(B) of this section prior to ninety days after the plaintiff has given notice of the endangerment to-

(i) the Administrator;

(ii) the State in which the alleged endangerment may occur;

(iii) any person alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in subsection (a)(1)(B) of this section,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter.

(B) No action may be commenced under subsection (a)(1)(B) of this section if the Administrator, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment -

(i) has commenced and is diligently prosecuting an

action under section 6973 of this title or under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9606],[1]

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604];

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604] and is diligently proceeding, with a remedial action under that Act [42 U.S.C.A. § 9601 et seq.]; or

(iv) has obtained a court order including a consent decree) or issued an administrative order under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980[2] [42 U.S.C.A. § 9606] or section 6973 of this title pursuant to which a responsible party is diligently conducting a removal action, Remedial Investigation and Feasibility Study (RIFS), or proceeding with a remedial action.

In the case of an administrative order referred to in clause (iv), actions under subsection (a)(1)(B) of this section are prohibited only as to the scope and duration of the administrative order referred to in clause (iv).

(C) No action may be commenced under subsection (a)(1)(B) of this section if the State, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment-

(i) has commenced and is diligently prosecuting an action under subsection (a)(1)(B) of this section;

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604]; or

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604] and is diligently proceeding with a remedial action under that Act [42 U.S.C.A. § 9601 et seq.]

(D) No action may be commenced under subsection (a)(1)(B) of this section by any person (other than a State or local government) with respect to the siting of a hazardous waste treatment, storage, or a disposal facility, nor to restrain or enjoin the issuance of a permit for such facility.

(E) In any action under subsection (a)(1)(B) of this section in a court of the United States, any person may intervene as a matter of right when the applicant claims an interest relating to the subject of the action and he is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest, unless the Administrator or the State shows that the applicant's interest is adequately represented by existing parties.

(F) Whenever any action is brought under subsection (a)(1)(B) of this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and with the Administrator.

(c) Notice

No action may be commenced under paragraph (a)(2) of this section prior to sixty days after the plaintiff has given notice to the Administrator that he will commence such action, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation. Any action respecting a violation under this chapter may be brought under this section only in the judicial district in which such alleged violation occurs.

(d) Intervention

In any action under this section the Administrator, if not a party, may intervene as a matter of right.

(e) Costs

The court, in issuing any final order in any action brought pursuant to this section or section 6976 of this title, may award costs of litigation (including, reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(f) Other rights preserved

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or

requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency).

Transporters

A transporter shall not be deemed to have contributed or to be contributing to the handling, storage, treatment, or disposal, referred to in subsection (a)(1)(B) of this section taking place after such solid waste or hazardous waste has left the possession or control of such transporter, if the transportation of such waste was under a sole contractual arrangement arising from a published tariff and acceptance for carriage by common carrier by rail and such transporter has exercised due care in the past or present handling, storage, treatment, transportation and disposal of such waste.

(Pub.L. 89-272, Title II, § 7002, as added Pub.L. 94-580, § 2, Oct. 21, 1976, 90 Stat. 2825, and amended Pub.L. 95-609, § 7(p), Nov. 8, 1978, 92 Stat. 3083; Pub.L. 98-616, Title IV, § 401, Nov. 8, 1984, 98 Stat. 3268.)

1. So in original. The comma Probably should be a semicolon.

2. So in original. Probably should be "1980".

Supreme Court, U.S.
FILED
DEC 28 1995
CLERK

No. 95-83

In The

Supreme Court of the United States

October Term, 1995

ALAN MEGHRIG AND MARGARET MEGHRIG,

Petitioners,

vs.

KFC WESTERN, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF ON THE MERITS

JOHN P. ZAIMES
Counsel of Record

CLIFTON J. MCFARLAND
MCCLINTOCK, WESTON, BENSHOOF, ROCHEFORT, RUBALCAVA & MACCUISH
444 South Flower Street
Forty Third Floor
Los Angeles, California 90071
(213) 623-2322
Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

I. INTRODUCTION/SUMMARY OF ARGUMENT ... 1

II. RESPONDENT AND ITS SUPPORTING *AMICI* IGNORE THE PLAIN LANGUAGE OF THE JURISDICTIONAL STATEMENT AND RELATED PORTIONS OF THE RCRA CITIZEN SUIT PROVISION, AND THE BROADER STATUTORY AND COMMON LAW ENVIRONMENTAL CONTEXT 3

A. The Jurisdictional Statement and Related Portions Of The RCRA Citizen Suit Provision Reaffirm The Limited Nature Of The District Courts' Jurisdiction 4

B. The Federal Environmental Statutory Framework, As Well As Its Legislative History And The Legislative History Of The RCRA Citizen Suit Provision, Reaffirm The Limited Jurisdiction Of The District Courts 6

C. Congress Did Not Intend The RCRA Citizen Suit Provision To Supplant CERCLA By Providing A Mechanism In RCRA To Recover Cleanup Costs 6

D. RCRA Is One Of Several Vehicles By Which Citizen Plaintiffs Can Address Property Contamination Issues 8

III. FEDERAL DISTRICT COURTS DO NOT HAVE BROAD EQUITABLE JURISDICTION TO AWARD "RESTITUTION" UNDER THE RCRA CITIZEN SUIT PROVISION 9

TABLE OF CONTENTS – Continued

Page

A. Federal Courts Are Courts Of Limited Jurisdiction 10

B. The Plain Language Of 42 U.S.C. § 6972 Does Not Authorize A Cause Of Action For Restitution 11

C. The *Porter-Hecht-Franklin* Line Of Cases Does Not Stand For The Proposition That District Courts Have Inherent Common Law Equity Jurisdiction To Award "Restitution" To Respondent And Similarly Situated Plaintiffs 12

D. Respondent's Understanding Of The Primary Purpose Of RCRA And Its Role In Statutory Interpretation Is Misplaced 14

IV. RESPONDENT'S CLAIM FOR MONETARY REIMBURSEMENT IS NOT A CLAIM FOR EQUITABLE RESTITUTION 15

V. A RCRA CITIZEN SUIT CLAIM MAY BE FILED ONLY WHEN AN ENDANGERMENT EXISTS 17

VI. RESPONDENT'S ATTEMPTS TO DISTINGUISH *CORT V. ASH* ARE UNAVAILING 19

VII. THIS COURT SHOULD RESOLVE BOTH OF THE ISSUES BEFORE IT IN THE INTERESTS OF JUDICIAL ECONOMY AND BECAUSE A CONFLICT EXISTS IN THE CIRCUITS AS TO BOTH OF THOSE ISSUES 19

VIII. CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Bender v. Williamsport Area School District, 475 U.S. 534, 106 S.Ct. 1326 (1988) 10

Chutich v. Touche-Ross & Co., 960 F.2d 721 (8th Cir. 1992) 11

City of Chicago v. Envt'l Defense Fund, ___ U.S. ___, 114 S.Ct. 1588 (1994) 15

Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080 (1975) 19

Estate of Cowart v. Wicklos Drilling Co., 505 U.S. 469, 112 S.Ct. 2589 (1992) 11

Exxon Corp. v. Hunt, 475 U.S. 355 (1986) 7

Franklin v. Gwinnett Public Schools, 503 U.S. 60, 112 S.Ct. 1028 (1992) 12, 13

Furrer v. Brown, 62 F.3d 1092 (8th Cir. 1995) 20

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987) 5, 6

Hallstrom v. Tillamook County, 493 U.S. 20 (1989) .. 6, 11, 15

Hecht Co. v. Bowles, 321 U.S. 587 (1944) 12

In re Acushnet River & New Bedford Harbor, 712 F. Supp. 994 (D. Mass. 1989) 16, 17

KFC Western v. Meghrig, 49 F.3d 518 (9th Cir. 1995) 20

Mertens v. Hewitt Assocs., ___ U.S. ___, 113 S.Ct. 2063 (1993) 14

Middlesex County Sewerage Authority v. National Sea Clammers Assn., 453 U.S. 1 (1981) 2, 6, 17, 19

Northwest Airlines v. Transportation Workers Union, 451 U.S. 77 (1981) 10, 12

TABLE OF AUTHORITIES – Continued

Page

PBGC v. LTV Corp., 496 U.S. 633, 110 S.Ct. 2668 (1990) 14

Porter v. Warner Holding Co., 328 U.S. 395 (1946) 12, 13, 15, 16

Rodriquez v. United States, 480 U.S. 522 (1987) 14

Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) 11

Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) 19

Tull v. United States, 481 U.S. 412 (1987) 16

Turner v. Bank of No. America, 4 U.S. 8, 1 L.Ed. 718 (1799) 10

U.S. v. Aceto Agric. Chem. Corp., 872 F.2d 1373 (8th Cir. 1989) 15

Weinberger v. Romero-Barcelo, 465 U.S. 305 (1982) 20

Wyandotte Transp. v. United States, 389 U.S. 191 (1967) 16

STATUTES

28 U.S.C. § 1367 14

42 U.S.C. § 6928 12

42 U.S.C. § 6972 *et seq.* (RCRA) ..... *passim*

42 U.S.C. § 9601 *et seq.* (CERCLA) 5, 6, 7, 8, 9, 15

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

S. Cooke, *The Law of Hazardous Waste* § 12.03(1) (1995) 7

D. Dobbs, *Law of Remedies* § 4.1(1) (2nd ed. 1993) 15, 16, 17

H.R. Rep. No. 198, 98th Cong., 2d Sess. (1984), reprinted in 1984 U.S.C.C.A.N. 5576, 5612 18

C. Wright, *Law of Federal Courts*, § 7 (5th ed. 1994) 10

U.S. Const. Art. III 10

I. INTRODUCTION/SUMMARY OF ARGUMENT

It is difficult to know where to begin to respond to the over 150 pages of argument and authorities submitted by Respondent and five different *amici curiae* in opposition to Petitioners' Brief on the Merits.[1] Respondent and its supporting *amici* barely discuss the extensive statutory analysis set forth in Petitioners' Brief on the Merits (which analysis also formed the backbone of the Petition for Writ of Certiorari granted by this Court) and also spend little time addressing the conflicting decisions rendered by the Ninth Circuit and the Eighth Circuit courts of appeal. Instead, Respondent and its supporting *amici* attempt an end run by fashioning an entirely new analytical focus: they contend that federal district courts have broad, inherent authority to render equitable relief and that Respondent here seeks equitable restitution, not damages.

That analysis is seriously flawed because it proceeds from a series of false assumptions, the most notable of which include:

1. A misapprehension of the limited jurisdiction of federal courts to render equitable relief in the face of a statute such as the RCRA citizen suit provision here at issue;

2. A mischaracterization of this action as an equitable restitution case; and

3. A pervasive, but absolutely erroneous, inference that the citizen suit provision of RCRA is the only remedy available where solid or hazardous waste presents an imminent and substantial endangerment to public health or the environment.

In attempting to carry forward this set of false assumptions, Respondent and its supporting *amici* fail to meaningfully address several critical features of the RCRA citizen suit provision, as well as established authority of this Court and others:

1. Federal courts are courts of limited jurisdiction and do not have unbridled authority to grant equitable relief;

2. The full text of the jurisdictional section of the RCRA citizen suit provision, not the excerpted portion repeatedly quoted by

---

[1] Although the United States has ostensibly filed a brief in support of Petitioners, that brief only supports Petitioners with respect to one of the two issues framed by this appeal, the imminent and substantial endangerment issue, and supports Respondent's equitable restitution argument as to the second issue.

Respondent and its *amici*, evinces an intent to limit the relief available to citizen plaintiffs;

3. Other, related portions of the RCRA citizen suit provision reaffirm the limitation of that provision to injunctive relief, not post-cleanup suits to recover monies expended;

4. The RCRA citizen suit provision does not exist in a vacuum, but is one of a series of similar citizen suit provisions, contained in federal environmental statutes, each with a legislative history that confirms Congress' intent to limit the remedies available to citizen plaintiffs;

5. This Court's teachings in *Gwaltney* and *Sea Clammers* reaffirm the limited relief available to citizen plaintiffs under federal environmental statutes and the need to follow the words of the statute itself;

6. The legislative history of RCRA's citizen suit provision further confirms Congress' intent to limit the relief available in citizen suit actions;

7. The language and structure of the RCRA citizen suit provision require that an imminent and substantial endangerment exist at the time suit is filed;

8. There is a well established body of state common law and statutory remedies for environmental contamination. In the 20 years since RCRA was first enacted, those common law and statutory remedies have consistently been relied on to afford both injunctive relief and cost recovery to injured plaintiffs; and

9. The leading authorities have long recognized a distinction between a claim in restitution seeking to have something wrongfully acquired by a defendant returned to a plaintiff and "damages", seeking to compensate a plaintiff for monies expended.

Although Respondent and its *amici* have erected an elaborate analytical pyramid, the foundations of that pyramid are unsound. One cannot simply sidestep the words of the statute, or 25 years of legislative history which traverses a number of federal environmental statutes, or this Court's precedents, or the past 20 years-plus of common law and statutory development of property contamination cleanup law in favor of an assertion that a claim for reimbursement of costs is really an equitable claim that federal courts have broad authority to adjudicate as a matter of "fairness". Neither does lining up

a set of *amici* to reiterate these assertions turn a flawed argument into a dispositive one.

Finally, lest Respondent's repeated incantations of considerations of "fairness" and "conscience" create a misimpression of the equities here, it will be well to remember the Petitioners and how fairness impacts them. Although this federal action continues to be fought based solely on the pleadings, the parallel state court action brought by KFC has moved ahead through two demurrers, an appeal and a summary judgment in favor of defendants. Thus, several important facts have now been established beyond dispute:

a. The Petitioners were teenaged siblings when they first took title to the property, title having been placed in their name by their father in 1963, unbeknownst to them. (J.A. 24)

b. Petitioners sold the property to their lessee, KFC, in 1975. At no time between 1963 and 1975, or at any other time, did the Petitioners ever cause or contribute to any contamination on the property. (J.A. 25)

c. There is no evidence that any contamination in fact occurred – whether caused by the Petitioners or someone else – while the Petitioners owned the property between 1963 and 1975. (J.A. 25)

d. There *is* evidence that service stations were operated on the subject property by persons never sued by Respondent for approximately 45 years before Petitioners bought it. (J.A. 5-20)

e. The Petitioners, who had nothing to do with any contamination on the property, are faced, 20 years after they last owned the property and several years after contamination was discovered, with a claim that has no express statute of limitations associated with it, and only serves to prolong their agony.

II. RESPONDENT AND ITS SUPPORTING *AMICI* IGNORE THE PLAIN LANGUAGE OF THE JURISDICTIONAL STATEMENT AND RELATED PORTIONS OF THE RCRA CITIZEN SUIT PROVISION, AND THE BROADER STATUTORY AND COMMON LAW ENVIRONMENTAL CONTEXT

Reviewing the brief for the Petitioners and the brief for the Respondent may create an impression that two entirely different

statutes are being discussed. That is because he brief for the Respondent largely ignores the thorough statutory construction analysis advanced by Petitioners in favor of a more generalized series of assumptions tied to Respondent's view of fairness. But that fairness analysis is no substitute for a disciplined review of the language of this particular statute, the legislative history of both the RCRA citizen suit provision and federal environmental citizen suit provisions in general, and the many alternative remedies available to parties faced with environmental contamination. Those subjects are treated more fully in the opening brief for the Petitioners, but we summarily review them here in order to point up the breakdown in the analysis of Respondent and its supporting *amici*.

A. The Jurisdictional Statement and Related Portions Of The RCRA Citizen Suit Provision Reaffirm The Limited Nature Of The District Courts' Jurisdiction.

Respondent and several of its supporting *amici* have a common habit of quoting only excerpts of the jurisdictional statement of the RCRA citizen suit provision. They characterize the statute as one granting district courts jurisdiction "to restrain any person" or to take "such other action as may be necessary". (Louisiana *Amicus* Br. 6, 8; Resp. Br., 8; K&B *Amicus* Br., 6, 10, 15.)[2] But what the RCRA jurisdictional statement in fact says is that the "district court shall have jurisdiction . . . to restrain any person . . . *to order such person to take* such other action as may be necessary, or both". (Pet. App. 28.) Thus, the plain words of the jurisdictional statement do not authorize the

[2] We have adopted the following shorthand references to the various briefs filed in support of Respondent: (a) the brief for the Respondent will be referred to as "Resp. Br."; (b) the Brief for the United States as *Amicus Curiae* Supporting Petitioners is referred to simply as "U.S. *Amicus* Br."; (c) the brief of *Amici Curiae* Massachusetts, Missouri, Alaska, Florida, Guam, Kansas, Kentucky, Louisiana, Nevada, New Jersey, New Mexico, New York, West Virginia and Wisconsin is referred to as "Mass., et al. *Amicus* Br."; (d) the brief of the Bi-State Development Agency of Missouri-Illinois Metropolitan District as *Amicus Curiae* Supporting Respondent is referred to as "Bi-State *Amicus* Br."; (e) the brief for the State of Louisiana through its Department of Transportation and Development as *Amicus Curiae* in Support of Respondent is referred to as "Louisiana *Amicus* Br."; (f) the brief of Kaufman and Broad Home Corporation and Kaufman and Broad South Bay, Inc. as *Amici Curiae* supporting Respondents is referred to as "K&B *Amicus* Br."

district courts to broadly "take such other action as may be necessary," but authorize those courts to restrain a person or to order a person to take other necessary action, or both, and nothing more.

That this jurisdictional section authorizes the district courts to provide injunctive relief to citizen plaintiffs and not monetary damages is confirmed by several additional portions of the citizen suit provision:

1. Citizen plaintiffs must give 90 days notice to the EPA, to the State, and to the alleged contaminator before undertaking a suit. If citizens like Respondent KFC were authorized to clean up property without giving notice, and then sue to recover their costs, this 90 days notice requirement would make little or no sense. (Pet. Br., pp. 19-20)[3];

2. Should EPA or the State elect to take charge of the contaminated site, a citizen suit is barred. (Pet. Br., p. 29);

3. There is no express statute of limitations provided for RCRA citizen suits, as contrasted with other federal environmental cost recovery statutes. (Pet. Br., pp. 23-24);

4. There is no set of guidelines for determining how the reasonableness of cleanup costs sought to be recovered under RCRA should be evaluated, as contrasted with the extensive regulations defining reasonableness under CERCLA, the primary environmental cost recovery statue. (Pet. Br., pp. 23-24);

5. The RCRA citizen suit provision authorizes an award of attorneys fees, while the primary federal environmental cost recovery statute, CERCLA, does not. This inconsistency strongly indicates that Congress viewed the jurisdictional reach of RCRA as less than that of CERCLA, since it chose not to provide an attorneys fees provision in that latter statute. (Pet. Br., p. 26.)

[3] Respondent KFC argues (Resp. Br., p. 10) that the notice provisions serve a purpose even when provided post-cleanup. But the "purposes" noted by Respondent are entirely *de minimis* and are unsupported by any legislative history or other evidence of that purpose.

B. The Federal Environmental Statutory Framework, As Well As Its Legislative History And the Legislative History Of The RCRA Citizen Suit Provision, Reaffirm The Limited Jurisdiction Of The District Courts

We will not repeat the extensive analysis of the federal environmental statutory framework within which RCRA fits. (Pet. Br. at pp. 26-34.) Suffice it to note at this juncture, however, that RCRA is one of several federal environmental statutes which contain similar citizen suit provisions. The legislative history of each of the statutes, beginning with the 1970 Clean Air Act[4] and flowing through subsequently enacted federal environmental statutes, confirms congressional intent to limit the remedies available to citizen plaintiffs by excluding jurisdiction to award damages. This concern was once again expressly reaffirmed in the legislative history of RCRA itself.[5]

C. Congress Did Not Intend The RCRA Citizen Suit Provision To Supplant CERCLA By Providing A Mechanism In RCRA To Recover Cleanup Costs

Petitioners have argued that, given the cost recovery remedy in CERCLA, the primary federal environmental contamination statute, and the limitations imposed on that remedy by Congress, Congress did not intend to create a more sweeping cost recovery remedy under RCRA by authorizing citizen suits to "restrain" or to "order such person to take such action as may be necessary". (Pet. Br. at 22-26). Respondent counters that allowing a RCRA cost recovery remedy

---

[4] This Court has examined environmental citizen suit provisions on three occasions, in *Gwaltney, Sea Clammers* and *Hallstrom*. On each occasion, this Court referenced the legislative histories of the various environmental citizen suit provisions back to the genesis of these provisions, in the Clean Air Act of 1970. *See, e.g. Hallstrom*, 493 U.S. at 29 (examining the legislative history of the Clean Air Act citizen suit provision in construing the RCRA citizen suit).

[5] Most notably, as the legislative history of the 1984 RCRA amendments demonstrates, Congress was concerned that a number of state law claims available to plaintiffs could be added to RCRA federal court suits under the doctrine of pendent jurisdiction. (Pet. Br., pp. 31-32) Congress expressed both its concern for burdening the federal courts with additional damages lawsuits and its awareness that, in the property contamination context, a number of state law causes of action for property damage compensation were already recognized.

would not unduly "interfere" with the CERCLA remedy. (Resp. Br. at 39-43). Respondent misses the point.

The issue is not one of interference but one of Congressional intent. It is noteworthy that CERCLA was enacted as a compromise in the lame duck session of the 96th Congress after a huge legislative effort. As the leading treatise notes:

> "By 1980, Congress had been trying for two years to enact some type of legislation to deal with the problem of cleaning up hazardous waste sites. The eventual result – [CERCLA] – was a compromise put together in the last days of the 96th Congress. . . . "
>
> * * *
>
> "The final version of the Act was conceived by an ad hoc committee of Senators who finished a last minute compromise which enabled the Act to pass."
>
> S. Cooke, *The Law of Hazardous Waste* § 12.03(1)(1995); *See also Exxon Corp. v. Hunt*, 475 U.S. 355, 365 n.8 (1986).

To accept the arguments of Respondent and its supporting *amici* would be to accept the proposition that the massive legislative effort and epic compromise necessary to enact CERCLA, with its detailed and limited cost recovery provision, was simply swept away by Congress four years later. It simply does not square with legislative reality to argue that: (1) the 98th Congress intended to create a broader cost recovery in RCRA than it had earlier barely managed to create in CERCLA, (2) that Congress did so in a single phrase in the RCRA statute, although it deemed much lengthier and more comprehensive provisions to be necessary in CERCLA, and (3) that Congress left nary a trace of its bold intentions on this controversial subject in the legislative history.

To the contrary, the existence, comprehensive nature and specific features of CERCLA are very strong evidence that Congress did not intend the RCRA citizen suit provision to provide a mechanism to recover cleanup costs.

D. RCRA Is One of Several Vehicles By Which Citizen Plaintiffs Can Address Property Contamination Issues

Respondent and its supporting *amici* both implicitly and explicitly presume that the RCRA citizen suit provision represents the only vehicle outside of CERCLA to address property contamination cleanup and reimbursement issues. Thus, for example, the argument is oft-repeated in the briefs supporting Respondent that, if plaintiffs like Respondent KFC are only allowed to pursue injunctive relief under RCRA and are only allowed to do so after giving 90 days notice, then contaminated properties will continue to fester for months before any relief can be obtained. (Louisiana *Amicus* Br., pp. 15-16; Mass., et al. *Amicus* Br., pp. 24-25; K&B *Amicus* Br., p. 17; Resp. Br., pp. 36-37.) That argument is fallacious, as confirmed by the KFC experience here.

KFC discovered the contamination in October 1988, fully cleaned it up by March 1989, did not give the 90 day notice until October,1990, and commenced a state court action in December, 1991, more than three years after it discovered the contamination and well before it filed its RCRA action. (Pet. Br., pp. 4-5, 20.) In its state court complaint, KFC alleged fully ten separate causes of action, nearly all common law, and all seeking to recover KFC's expenditures in cleaning up the site. Several of those causes of action, including nuisance, trespass and negligence, could have served as a basis for injunctive relief in October 1988, when the contamination was first discovered.[6]

Of course, notwithstanding their urgings that a RCRA cost recovery action is necessary to fill a gap in the remedies available to citizen plaintiffs, Respondent and its supporting *amici* fully realize that these state common law and statutory remedies were and are already available to plaintiffs like Respondent. They make passing references to the

[6] The ten causes of action were for: (1) statutory cost recovery; (2) tortious breach of duty; (3) private nuisance; (4) public nuisance; (5) equitable indemnity; (6) implied contract; (7) ultrahazardous activity; (8) negligence; (9) unlawful business practices; and (10) trespass. Following Petitioners' demurrer, eight of those causes of action were deemed barred by statutes of limitations of up to three years, and two others failed to state a claim on which relief could be granted. It was only after Petitioners successfully demurred to Respondent's complaint that KFC decided to pursue this action in federal court for cost reimbursement under the RCRA citizen suit provision. (Pet. Br., pp. 5-6.)

availability of such relief, but obliquely demean those avenues by referring to "difficulties of proof" which purportedly accompany them (Bi-State *Amicus* Br., pp. 15-16), and "short" statutes of limitations (Louisiana *Amicus* Br., p. 3).[7] But there are no elements of proof in the state common law causes of action available to Respondent that are significantly different from those under RCRA. For example, Respondent KFC would ultimately have to prove under RCRA that a contaminator "caused or contributed" to contamination, and those elements of causation and contribution are inherent in virtually all of the common law theories, including nuisance, trespass, negligence, etc. Neither is the three year statute of limitations which applies to most of Respondent's state law causes of action "short". And in the final analysis, neither the fact that there may be difficulties of proof nor the length of a statute of limitations has any bearing on whether Congress *intended* to afford citizen plaintiffs a cost recovery remedy in the RCRA citizen suit provision.

The fundamental truth is that RCRA has been in existence for about 20 years, and countless plaintiffs, including Respondent KFC have, during those 20 years, found several other common law bases upon which to pursue their claims for cost reimbursement of all manner of contaminated sites (including refined petroleum product contamination which is excluded from CERCLA).

III. FEDERAL DISTRICT COURTS DO NOT HAVE BROAD EQUITABLE JURISDICTION TO AWARD "RESTITUTION" UNDER THE RCRA CITIZEN SUIT PROVISION

The notion of a broad equitable power in the federal courts which would apply to this action will not withstand closer analysis.

[7] The Massachusetts, et al. amicus brief argues that states lack *statutes* which will afford plaintiffs like Respondent KFC a remedy and that therefore RCRA should provide that remedy for cost reimbursement. (Mass., et al. *Amicus* Br., p. 3.) But, as Massachusetts and its co-amicus states know, states have numerous common law theories of relief. Indeed, the Massachusetts, et al. brief makes reference to some of those at pages 15-17.

A. Federal Courts Are Courts Of Limited Jurisdiction

Unlike their state counterparts, federal district courts are courts of limited jurisdiction that have not been vested with general, open-ended lawmaking power. *Northwest Airlines v. Transportation Workers Union*, 451 U.S. 77 (1981). As the leading treatise on federal courts states:

> "It is a principle of first importance that the federal courts are courts of limited jurisdiction. Most state courts are courts of general jurisdiction, and the presumption is that they have jurisdiction over a particular controversy unless a showing is made to the contrary. The federal courts, on the other hand, cannot be courts of general jurisdiction. They are empowered to hear only such cases as are within the judicial power of the United States, as defined in the Constitution, and had been entrusted to them by a jurisdictional grant by Congress. *Bender v. Williamsport Area School District*, 1988, 106 S.Ct. 1326, 1331; 475 U.S. 534, 541; 89 L.Ed. 2d 501. Because of this unusual nature of the federal courts and because it would be not simply wrong but indeed an unconstitutional invasion of the powers reserved to the states if those courts were to entertain cases not within their jurisdiction, the rule is well settled that the party seeking to invoke the jurisdiction of a federal court must demonstrate that the case is within the competence of such a court. The presumption is that the court lacks jurisdiction in a particular case until it has been demonstrated that jurisdiction over the subject matter exists." *See, Turner v. Bank of No. America*, 4 U.S. 8, 11, 1 L.Ed. 718, 719 (1799). C. Wright, *Law of Federal Courts* § 7 (5th ed. 1994).[8]

Absent a congressional grant of authority to the federal courts to formulate federal common law in the area delineated in a statute, federal courts have general common law jurisdiction in only four narrow areas: (1) cases involving the rights and obligations of the United States; (2) cases involving interstate and international disputes implicating the rights of states; (3) cases involving interstate and international disputes implicating relations with foreign nations; and (4) admiralty cases. *See, Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-641 (1981); *See also Chutich v. Touche-Ross & Co.*, 960 F.2d 721, 724 (8th Cir. 1992). RCRA's citizen suit provision contains no grant of authority to the district courts to formulate general federal common law, and the claims of Respondent KFC, as a private party, do not fall within any of the four narrow areas in which federal courts have general common law jurisdiction. The federal courts thus lack jurisdiction to adjudicate KFC's federal common law claims for damages or for restitution.

[8] Even amicus Bi-State acknowledges that "[O]ur Constitution has relegated to Congress the ultimate say in what remedies, including equitable ones, the lower federal courts may grant", citing Article III of the Constitution. (Bi-State *Amicus* Br., p. 8.)

B. The Plain Language Of 42 U.S.C. § 6972 Does Not Authorize A Cause Of Action For Restitution

It is well-settled that the starting point for interpreting a statute is the language of the statute itself. *Estate of Cowart v. Wicklos Drilling Co.*, 505 U.S. 469, 112 S.Ct. 2589, 2594, (1992); *Hallstrom v. Tillamook County*, 493 U.S. 20, 25 (1989). When a statute speaks clearly, the judicial inquiry as to its meaning is limited, except in extraordinary circumstances. *Estate of Cowart, supra.*

There are three classes of persons subject to suit under 42 U.S.C. § 6972:

(1) any person alleged to be in violation of any permit, standard, order, etc., which has become effective pursuant to RCRA (§ 6972(a)(1)(A)); or

(2) any person contributing to the past or present handling of any *solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment* (§ 6972(a)(1)(B) (emphasis added)); or

(3) the Administrator, where the Administrator has failed to perform any non-discretionary act or duty under RCRA (§ 6972(a)(2)).

In the case of an alleged violation, endangerment, or failure by the EPA Administrator, Congress granted district courts jurisdiction under 42 U.S.C. § 6972(a):

(1) *to enforce* the permit, standard, order, etc., referred to in paragraph (a)(1)(A);

(2) *to restrain* any person contributing to the past or present handling of any solid or hazardous waste [which may present an imminent and substantial endangerment to health or the environment];

(3) *to order* such person *to take such other action* as may be necessary, or both;

(4) *to order* the Administrator to perform the act or duty referred to in paragraph (2); or

(5) *to apply* any appropriate civil penalties under 42 U.S.C. § 6928(a) and (g) (emphasis added).

Any reasonable construction of these provisions leaves no doubt that RCRA does not create a cause of action in restitution. The plain language of § 6972 provides private citizens with a limited right to bring an enforcement and/or abatement action in a district court against specific classes of persons who are responsible for a violation of federal environmental law that is ongoing at the time that suit is filed.

Respondent argues that the phrase "order such person to take such other action as may be necessary" is not limited to injunctive relief. But this analysis is plainly wrong. Federal courts are courts of limited jurisdiction. *Northwest Airlines, supra,* at 96-97. They are not free to grant any and all relief asked of them, unless such relief is explicitly authorized. They are limited by the enforcement/abatement remedies expressly set forth in statutes which, like RCRA, have elaborate and comprehensive enforcement and remedial abatement provisions.

C. The *Porter-Hecht-Franklin* Line Of Cases Does Not Stand For The Proposition That District Courts Have Inherent Common Law Equity Jurisdiction To Award "Restitution" To Respondent And Similarly Situated Plaintiffs

Respondent and its supporting *amici* argue that a line of cases emanating from *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946) and *Hecht Co. v. Bowles*, 321 U.S. 587 (1944) and more recently exemplified by *Franklin v. Gwinnett Public Schools*, 503 U.S. 60, 112 S.Ct. 1028 (1992) stands for the proposition that federal district courts may award "restitution" to plaintiffs like Respondent under RCRA based on a broad authority residing in federal courts to award equitable relief. This analysis is misguided on several fronts. First, to the extent *Porter* and *Hecht* are based on federal common law equitable jurisdiction, they were actions brought by the United States, not by private

parties like KFC, and arguably within exception (1) (involving the rights and obligations of the United States) noted above. Second and more importantly, Respondent and its supporting *amici* either misread or misquote the principles articulated in those cases. The critical determination by this Court in *Porter* was as follows:

> "Unless a statute in so many words, *or by a necessary and inescapable inference,* restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."
>
> *Id.* at 398 (emphasis added).

Although certain of the *amici* supporting Respondent ignore the phrase in *Porter* "or by a necessary and inescapable inference", that is a critical part of the Court's ruling and the analysis of this issue. Here, even assuming that the federal district courts have equitable jurisdiction, there is a necessary and inescapable inference derived from several sources that the district courts' jurisdiction under RCRA's citizen suit provision is limited:

1. The language of the RCRA jurisdictional statement authorizes federal district courts to "restrain" or to "order such person to take such other action as may be necessary, or both". That language restricts the district courts' equity powers significantly more than the broad statutory provision in *Porter,* which authorized the district court to grant "a permanent or temporary injunction, restraining order *or other order.*" *Id.* at 397 (emphasis added), and by necessary and inescapable inference restricts the court's equitable authority.

2. As reviewed elsewhere in this brief and in Petitioners' Opening Brief on the Merits, the RCRA notice provisions, citizen suit bar provisions, lack of a statute of limitations, and attorneys fees provisions reaffirm the limited scope of remedies available to citizens under the Act and the necessary and inescapable inference of restrictions on the district court's equity powers.

3. So, too, the antecedent citizen suit provisions in other federal environmental statutes, along with their legislative history, make clear that Congress did not intend environmental citizen suit provisions to spawn federal court litigation to recover costs.

Third, the *Franklin* case has no bearing on the RCRA statute. In *Franklin,* the statute was absolutely silent on the subject of remedies available to an aggrieved plaintiff. Accordingly, this Court determined

that, where a federal statute provides for a general right to sue (even an implied right to sue as in that case but unspecified remedies), the Court will presume the availability of all appropriate remedies, particularly where the legislative history of related statutes evinces no Congressional intent to limit those remedies. (*Id.* at 1032.) By contrast, RCRA provides particularized citizen remedies, and its legislative history and that of related statutes reaffirm the limitations on those remedies.[9]

D. Respondent's Understanding Of The Primary Purpose Of RCRA And Its Role In Statutory Interpretation Is Misplaced

Respondent and its supporting *amici* premise much of their argument concerning the broad relief available under RCRA's citizen suit provision on an assertion that the primary policy underlying the RCRA statute is that "hazardous waste . . . should be treated, stored or disposed of so as to minimize the present and future threat to human health and environment." (Resp. Br. at 36-37.) However, even assuming that that is RCRA's primary purpose, as this Court has previously observed, construing a statute based on the primary purpose of legislation is ill-advised:

> "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law."
>
> *Rodriquez v. United States*, 480 U.S. 522, 525-526 (1987); *PBGC v. LTV Corp.*, 496 U.S. 633, 646-647 (1990).[10]

---

[9] Respondent and *amici* also claim that the savings clause of RCRA, 42 U.S.C. § 6972(f), saves a private party plaintiff's federal common law causes of action in equity and that those claims may be brought concurrently with a 42 U.S.C. § 6972 action. (Resp. Br., pp. 12-13; K&B *Amicus* Br., pp. 8-9; Mass., et al. *Amicus* Br., pp. 15-17; Louisiana *Amicus* Br., 13-14; Bi-State *Amicus* Br. p. 12.) *See* 28 U.S.C. § 1367. But this savings clause does no more than preserve existing state law remedies. It does not create or preserve a body of federal common law that is not part of the statute.

[10] *See also Mertens v. Hewitt Assocs.*, ___ U.S. ___, 113 S. Ct. 2063, 2071 (1993) ("vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of the text regarding the *specific* issue under consideration").

Moreover, in *Hallstrom v. Tillamook*, this Court recently addressed, and rejected, an argument that the RCRA statute should be construed liberally based on a broad Congressional intent in enacting that statute:

> "Rather, the legislative history indicates an intent to strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits.
>
> * * *
>
> Giving full effect to the words of the statute preserves the compromise struck by Congress."
>
> *Id.*, 493 U.S. 20, 29 (1989).

In any event, RCRA is primarily a regulatory statute that created a "prospective cradle-to-grave regulatory regime governing the movement of hazardous waste in our society." *U.S. v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1380 (8th Cir. 1989); *see also City of Chicago v. Envt'l Defense Fund*, ___ U.S. ___, 114 S. Ct. 1588, 1590 (1994). And even though, as Respondent concedes, RCRA's primary purpose is to ensure proper treatment, storage and disposal of hazardous waste, RCRA's primary purpose is *not* to ensure *cleanup* of improperly disposed waste; that is the primary purpose of another comprehensive federal statute: CERCLA.

IV. RESPONDENT'S CLAIM FOR MONETARY REIMBURSEMENT IS NOT A CLAIM FOR EQUITABLE RESTITUTION

Equitable restitution requires that something wrongfully taken from a plaintiff be returned by a defendant. Thus, monies wrongfully collected by defendant may be restored to a plaintiff (*Porter, supra*), or personal property taken from a plaintiff may be ordered returned by defendant. D. Dobbs, *Law of Remedies, infra.*

But equitable restitution is a narrowly drawn remedy. It is not a substitute for every damages claim in which a plaintiff seeks to be compensated for out of pocket losses. The authorities make this clear:

> "Restitution measures the remedy by the defendant's gain and seeks to force disgorgement of that gain. It differs in its goal or principle from damages, which measures the remedy by the plaintiff's loss and seeks to provide compensation for that loss."
>
> * * *
>
> "The word restitution means restoration. Restitution is a return or restoration of what the defendant has gained in a transaction."
>
> D. Dobbs, *Law of Remedies* § 4.1(l) at 555 (2d ed. 1993).

If Respondent's claim here can be characterized as equitable restitution, then virtually any damages claim can be so denominated. Equitable restitution is not a safety net for plaintiffs who are otherwise barred from bringing a damages claim.

Respondent argues that the restitutionary relief it seeks is not tantamount to an award of damages. But none of the cases cited by Respondent support the proposition that restitution is available here.[11]

---

[11] For example, Respondent cites *Porter* for support, but the holding in that case is unavailing. In *Porter,* the Administrator of the Office of Price Administration sought an injunction restraining future overcharges and requiring the landlord to return to the tenants the excess rents collected. 328 U.S. at 396-397. But, as noted above, *Porter* is a statutory interpretation case involving a statute significantly different from that here. Moreover, what was properly characterized as restitution in *Porter* was the classic case of a plaintiff seeking the disgorgement of ill-gotten gains secured in a transaction. *In re Acushnet River & New Bedford Harbor,* 712 F.Supp. 994, 1002 (D. Mass. 1989).

Neither is *Wyandotte Transp. Co. v. United States,* 389 U.S. 191 (1967), on point. *Wyandotte* was an implied right of action case, not a case equating a damages claim with an equitable restitution claim. *In re Acushnet River, supra.* Moreover, the Court expressly observed that *Wyandotte's* interpretation was contrary to: (1) the Court's prior construction of the Act, (2) the Court's decisions on analogous issues of statutory construction and (3) a major related federal statute and that *Wyandotte's* interpretation lacked any indicia of Congressional intent. The parallels to Respondent's assertions here are close.

The other Supreme Court precedent cited by Respondent, *Tull v. United States,* 481 U.S. 412 (1987), actually supports Petitioners. In *Tull,* the United States sought injunctive relief and civil penalties under the Clean Water Act. In assessing the petitioner's argument that he was entitled to a jury trial, this Court analyzed whether the civil penalties sought by the United States were legal or equitable in nature. The Court firmly rejected the government's argument that such penalties, even when determined by reference to profits earned, are in the nature of restitution. The Court noted that restitution "is limited to restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant," (citing *Porter*). *Id.* at 424.

Indeed, in attempting to distinguish this Court's decision in *Middlesex County Sewerage Authority v. National Sea Clammers Assn.,* 453 U.S. 1 (1981) ("*Sea Clammers*"), Respondent actually points the way for Petitioners and for the Court. Respondent argues:

> "*Sea Clammers* is not the controlling precedent in this case for the simple reason that the *Sea Clammers* plaintiffs, unlike Respondent, truly were seeking 'damages' – a term this Court has defined to mean relief '*intended to provide a victim with monetary compensation for an injury to his person, property or reputation*' and as distinguished from equitable actions for specific relief such as restitutionary awards of back pay."
>
> Resp. Br. p. 23 (emphasis added).

We could not agree more. What Respondent seeks here is *compensation for an injury to its property,* and that certainly is distinguished from an equitable action for specific relief such as restitutionary awards of back-pay, or return of specific property, as we noted at the outset of this section.[12]

V. A RCRA CITIZEN SUIT CLAIM MAY BE FILED ONLY WHEN AN ENDANGERMENT EXISTS

Respondent and its *amici* urge that the "imminent and substantial endangerment" referred to in the RCRA citizen suit provision describes the nature of the solid or hazardous waste and not the conditions of contamination at the time suit is filed. Respondent relies on the subsection of the RCRA citizen suit provision that describes potential defendants and provides that an action may be commenced:

---

[12] Even assuming, *arguendo,* that what Respondent seeks can properly be characterized as "restitution," that does not end the inquiry. Respondents assume that a restitutionary remedy is necessarily an equitable remedy. It is well to remember that the jurisdiction of the law courts and equity courts overlapped with respect to restitution. Indeed, the leading treatise notes that: "[r]estitution claims for money are usually claims at law." D. Dobbs, *Law of Remedies* § 4.1(l) at 556. See also *In re Acushnet River, supra,* at 1001-1003.

> "against any person . . . who has contributed to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment."
>
> 42 U.S.C. § 6972(a)(1)(B).

But the fair reading of this subsection is that suit can be brought against persons who have engaged in or are engaging in certain activities with respect to solid or hazardous waste that "may [presently] present" an endangerment. In other words, suit can be brought when an endangerment exists. This construction is confirmed by a straightforward reading of the subsection and by other subsections of the citizen suit provision:

1. The statute elsewhere provides that a RCRA citizen suit "shall be brought in the district court for the district in which . . . the alleged endangerment may occur." 42 U.S.C. § 6972(a). This provision clearly indicates that suit may be filed where a current threat exists. The use of the present tense "may occur" allows for no other conclusion. This provision clearly does *not* contemplate filing of suits where a current threat no longer exists.

2. The notice provision provides that no action may be commenced prior to 90 days after notice to "the State in which the alleged endangerment may occur." 42 U.S.C. § 6972(b)(2)(A)(ii).

3. The citizen suit provision states that no such action may be commenced if the EPA has taken specified abatement actions in response to the activities "which may present the alleged endangerment." 42 U.S.C. 6972(b)(2)(B).

Thus, the statutory language unambiguously allows suit only where an endangerment exists. The legislative history is completely consistent. The House Committee report states that the RCRA citizen suit provision:

> "Confers on citizens a limited right under section 7002 [42 U.S.C. § 6972] to sue to abate an imminent and substantial endangerment. . . . "
>
> H.R. Rep. No. 198, 98th Cong., 2d Sess. (1984), reprinted in 1984 U.S.C.C.A.N. 5576, 5612.

VI. RESPONDENT'S ATTEMPTS TO DISTINGUISH *CORT V. ASH* ARE UNAVAILING

Petitioners have argued that the RCRA citizen suit provision does not expressly provide a right of action for the recovery of cleanup costs. Pet. Br. 13-16. Therefore, for such a right of action to exist, it must be implied and must meet the test of *Cort v. Ash,* 422 U.S. 66 (1975). Respondent and its *amici* counter that the RCRA citizen suit does expressly provide a right of action to citizens and that Respondent merely seeks to imply a *remedy,* so *Cort v. Ash* is inapplicable. But this is a distinction without a difference.

As the Court expressly noted in *Sea Clammers* in discussing the *Cort v. Ash* test:

> "In *Cort v. Ash,* 422 U.S. 66, 78, 95 S.Ct. 2080, 2088, 45 L.Ed.2d 26 (1975), the Court identified several factors that are relevant to the question of implied private *remedies.*"
>
> *Sea Clammers, supra,* at 17 (emphasis added.)

And as the Court has elsewhere noted:

> "It is an elemental canon of statutory construction that where a statute expressly provides a particular *remedy* or *remedies,* a court must be chary of reading others into it."
>
> *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S., 11, 19 (1979); (emphasis added).

This Court has also stated that:

> "In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the *remedies* it considered appropriate."
>
> *Sea Clammers,* 453 U.S. at 15 (emphasis added).

VII. THIS COURT SHOULD RESOLVE BOTH OF THE ISSUES BEFORE IT IN THE INTERESTS OF JUDICIAL ECONOMY AND BECAUSE A CONFLICT EXISTS IN THE CIRCUITS AS TO BOTH OF THOSE ISSUES

The Petition for Writ of Certiorari filed with this Court presented two questions for review: (1)"whether the citizen suit provision of RCRA . . . authorizes a private party suit for reimbursement of cleanup costs" and (2)"whether the citizen suit provision of RCRA . . . can be

used to authorize a suit for contamination that was fully remediated years before commencement of suit." This Court granted certiorari as to both issues.

The United States argues that it is only necessary for this Court to reach one of the two issues presented to this Court, the imminent and substantial endangerment issue. To the contrary, both should be resolved here. Both were accepted for review by the Court, and the interests of judicial economy would be served by resolving both now. *See Weinberger v. Romero-Barcelo,* 465 U.S. 305, 321-322 (1982) (Powell, J. concurring).

Moreover, a conflict clearly exists between the Eighth and Ninth Circuits as to the second issue: the right of citizen plaintiffs to recover cleanup costs under RCRA. The Court of Appeals for the Ninth Circuit held that RCRA authorizes a restitutionary remedy. *KFC Western Inc. v. Meghrig,* 49 F.3d at 521. The Eighth Circuit had held that the RCRA citizen suit "on its face does not provide for the recovery of remediation costs." *Furrer v. Brown,* 62 F.3d at 1095 (8th Cir. 1995).

VIII. CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be reversed. The opinion of the Ninth Circuit should be vacated and the case dismissed.

Dated: December 28, 1995.

Respectfully submitted,

JOHN P. ZAIMES
Counsel of Record

CLIFTON J. MCFARLAND
MCCLINTOCK, WESTON, BENSHOOF, ROCHEFORT, RUBALCAVA & MACCUISH

Counsel for Petitioners

(5)

Supreme Court, U.S.
FILED
NOV 8 1995
CLERK

No. 95-83

In the Supreme Court of the United States

OCTOBER TERM, 1995

ALAN MEGHRIG AND MARGARET MEGHRIG,
PETITIONERS

v.

KFC WESTERN, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

ANNE S. ALMY
JOHN T. STAHR
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

36 pp

QUESTION PRESENTED

Whether Section 7002(a)(1)(B) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6972(a)(1)(B), authorizes a private landowner to sue prior owners in federal court to recover its past cost of removing hazardous wastes that they had left at the site, but that no longer pose any danger to health or the environment.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
A. The Resource Conservation and Recovery Act	3
B. The proceedings below	6
Summary of argument	9
Argument:	
Section 7002(a)(1)(B) of RCRA does not provide a mechanism for a private landowner to sue prior owners in federal court to recover past costs of removing hazardous wastes that no longer pose any danger at the site	11
A. Section 7002(a)(1)(B) authorizes a person to commence a civil action in response to a current threat of substantial danger to health or the environment	11
B. A citizen plaintiff that properly states a cause of action under Section 7002(a)(1)(B) may invoke the Court's traditional equitable powers to obtain appropriate relief	22
Conclusion	29

TABLE OF AUTHORITIES

Cases:

Amax, Inc. v. *Sohio Indus. Prods. Co.*, 469 N.Y.S.2d 282 (N.Y. Sup. Ct. 1983)	19
Brandon Township v. *Jerome Builders, Inc.*, 263 N.W.2d 326 (Mich. Ct. App. 1977)	22, 26
Burk v. *High Point Homes, Inc.*, 197 N.Y.S.2d 969 (Sup. Ct.), appeal dismissed, 205 N.Y.S.2d 862 (N.Y. App. Div. 1960)	19
City of Chicago v. *Environmental Defense Fund*, 114 S. Ct. 1588 (1994)	3
City of Paterson v. *Fargo Realty Inc.*, 415 A.2d 1210 (N.J. Dist. Ct. 1980)	22

Cases—Continued: Page

City of Toledo v. *Beazer Materials & Services, Inc.*, 833 F. Supp. 646 (N.D. Ohio 1993) 16
Comite Pro Rescate de La Salud v. *Puerto Rico Aqueduct & Sewer Authority*, 888 F.2d 180 (1st Cir. 1989), cert. denied, 494 U.S. 1029 (1990) 16
Dague v. *City of Burlington*, 935 F.2d 1343 (2d Cir. 1991), rev'd in part, 505 U.S. 557 (1992) 16, 17
Drouin v. *Ridge Lumber, Inc.*, 619 N.Y.S.2d 433 (N.Y. App. Div. 1994) 19
Earl v. *Clark*, 219 N.W.2d 487 (Iowa 1974) 19
Environmental Defense Fund v. *EPA*:
465 F.2d 528 (D.C. Cir. 1972) 16
852 F.2d 1316 (D.C. Cir. 1988), cert. denied, 489 U.S. 1011 (1989) 3
Furrer v. *Brown*, 62 F.3d 1092 (8th Cir. 1995) 9
Gwaltney of Smithfield, Ltd. v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987) 11, 14, 27
Hallstrom v. *Tillamook County*, 493 U.S. 20 (1989) 11, 16, 27
Hebron Public School Dist. No. 13 v. *U.S. Gypsum*, 690 F. Supp. 866 (D.N.D. 1988) 27
Hecht Co. v. *Bowles*, 321 U.S. 321 (1944) 22
KFC Western, Inc. v. *Meghrig*, 28 Cal. Rptr. 2d 676 (Cal. Ct. App. 1994) 20
Mailman's Steam Carpet Cleaning Corp. v. *Lizotte*, 616 N.E.2d 85 (Mass. 1993) 20
McClellan Ecological Seepage Situation v. *Perry*, 47 F.3d 325 (9th Cir. 1995), cert. denied, No. 94-1807 (Oct. 2, 1995) 21
Mertens v. *Hewitt Assocs.*, 113 S. Ct. 2063 (1993) .. 22
Oberst v. *Mays*, 365 P.2d 902 (Colo. 1961) 22
Petropoulos v. *Columbia Gas of Ohio, Inc.*, 840 F. Supp. 511 (S.D. Ohio 1993) 16
Pollard v. *Land West, Inc.*, 526 P.2d 1110 (Idaho 1974) 19
Porter v. *Warner Holding Co.*, 328 U.S. 395 (1946) 22, 23, 24, 25
Price v. *United States Navy*, 39 F.3d 1011 (9th Cir. 1994) 21
Roadmaster Indus., Inc. v. *Columbia Mfg. Co.*, 893 F. Supp. 1162 (D. Mass. 1995) 19

Cases—Continued: Page

School Committee of Town of Burlington v. *Department of Education*, 471 U.S. 359 (1985) 24
Sheridan Oil Co. v. *Wall*, 103 P.2d 507 (Okla. 1940) 19
State v. *Schenectady Chems., Inc.*, 479 N.Y.S.2d 1010 (N.Y. App. Div. 1984) 26
Stratford Theater, Inc. v. *Town of Stratford*, 101 A.2d 279 (Conn. 1953) 19
Testa v. *Katt*, 330 U.S. 386 (1947) 20
Thompson v. *Thompson*, 484 U.S. 174 (1988) 20
Town of Hooksett School Dist. v. *W.R. Grace & Co.*, 617 F. Supp. 126 (D.N.H. 1984) 27
United States v. *Aceto Agric. Chems. Corp.*, 872 F.2d 1373 (8th Cir. 1989) 8
United States v. *Conservation Chem. Co.*, 619 F. Supp. 162 (W.D. Mo. 1985) 17
United States v. *Moore*, 340 U.S. 616 (1951) 22, 24
United States v. *Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) 8
United States v. *Price*, 688 F.2d 204 (3d Cir. 1982) 17
United States v. *Valentine*, 856 F. Supp. 621 (D. Wyo. 1994) 17
Weinberger v. *Romero-Barcelo*, 456 U.S. 305 (1982) 22, 24, 25
Wilshire Westwood Assocs. v. *Atlantic Richfield Co.*, 24 Cal. Rptr. 2d 562 (Cal. Ct. App. 1993) 20
Wyandotte Transp. Co. v. *United States*, 389 U.S. 191 (1967) 22, 26, 28

Statutes and rule:

Clean Air Act, 4 U.S.C. 7401 *et seq.* 4
§ 113, 42 U.S.C. 7413 (Supp. V 1993) 4
§ 303, 42 U.S.C. 7603 (Supp. V 1993) 4
§ 304(a)(1), 42 U.S.C. 7604(a)(1) (Supp. V 1993) 5
Clean Water Act, 33 U.S.C. 1251 *et seq.* 4
§ 309, 33 U.S.C. 1319 (1988 & Supp. V 1993) .. 4
§ 311(f), 33 U.S.C. 1321(f) 12
§ 504, 33 U.S.C. 1364 4
§ 505(a)(1), 33 U.S.C. 1365(a)(1) 5, 13

Statutes and rule—Continued: Page

Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*:
§ 101(14), 42 U.S.C. 9601(14) 9
§ 107(a), 42 U.S.C. 9607(a) 12
§ 107(a)(4)(B), 42 U.S.C. 9607(a)(4)(B) 9
§ 310(a)(1), 42 U.S.C. 9659(a)(1) 5
Deepwater Port Act of 1974, 33 U.S.C. 1515(a)(1) 5
Education of the Handicapped Act, 20 U.S.C. 1415(e)(2) 24
Emergency Price Control Act of 1942, ch. 26, § 205(a), 56 Stat. 33 23
Endangered Species Act of 1973, 16 U.S.C. 1540(g)(1) 5
Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221:
§ 401(a), 98 Stat. 3268-3269 13
§ 401(b), 98 Stat. 3269 13
Housing and Rent Act of 1947, ch. 163, § 206(b), 61 Stat. 199-200 24
Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. 1415(g)(1) 5
Noise Control Act of 1972, 42 U.S.C. 4911(a)(1) 5
Outer Continental Shelf Lands Act, 43 U.S.C. 1349(a)(1) 5
Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.* 2
§ 1004(5), 42 U.S.C. 6903(5) 3
§ 1004(15), 42 U.S.C. 6903(15) 5
§ 1004(27), 42 U.S.C. 6903(27) 3
§§ 3001-3013, 42 U.S.C. 6921-6934 (1988 & Supp. V 1993) 3
§ 3008, 42 U.S.C. 6928 4
§§ 4001-4009, 42 U.S.C. 6941-6949 3
§ 7002, 42 U.S.C. 6972 ..... 2, 4, 5, 8, 10, 12, 20, 21
§ 7002(a), 42 U.S.C. 6972(a) 6, 8, 9, 12, 13, 24, 25, 28
§ 7002(a)(1)(A), 42 U.S.C. 6972(a)(1)(A) 5, 14
§ 7002(a)(1)(B), 42 U.S.C. 6972(a)(1)(B) ..... *passim*

Statutes and rule—Continued: Page

§ 7002(b), 42 U.S.C. 6972(b) 21
§ 7002(b)(1)(B), 42 U.S.C. 6972(b)(1)(B) 21
§ 7002(b)(2), 42 U.S.C. 6972(b)(2) 6
§ 7002(b)(2)(A), 42 U.S.C. 6972(b)(2)(A) 6, 16
§ 7002(b)(2)(A)(ii), 42 U.S.C. 6972(b)(2)(A)(ii) 12
§ 7002(b)(2)(A)(iii), 42 U.S.C. 6972(b)(2)(A)(iii) 27
§ 7002(b)(2)(B), 42 U.S.C. 6972(b)(2)(B) 6, 12
§ 7002(b)(2)(C), 42 U.S.C. 6972(b)(2)(C) 6
§ 7002(f), 42 U.S.C. 6972(f) 15, 20
§ 7003, 42 U.S.C. 6973 ..... 2, 6, 8, 13, 17, 21, 22, 27
§ 7003(a), 42 U.S.C. 6973(a) 4, 6, 8, 22
§ 9003(h)(6), 42 U.S.C. 6991b(h)(6) 12
Rivers and Harbors Appropriation Act of 1899, ch. 425, 30 Stat. 1121 22
Safe Drinking Water Act, 42 U.S.C. 300j-8(a)(1) 5
Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1270(a)(1) 5
Toxic Substances Control Act, 15 U.S.C. 2619(a)(1) 5
50 U.S.C. App. 925(a) (1946) 23
50 U.S.C. App. 1986(b) (1958) 24
Fed. R. Civ. P. 12(b)(6) 7

Miscellaneous:

1 D. Dobbs, *Law of Remedies* (2d ed. 1993) 25
H.R. Rep. No. 198, 98th Cong., 1st Sess. Pt. 1 (1983) 13, 21
Restatement of Restitution (1937) 25, 26, 27, 28
S. Rep. No. 284, 98th Cong., 1st Sess. (1983) 13, 21
Staff of Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 96th Cong., 1st Sess., *Hazardous Waste Disposal* (Comm. Print 96-IFC 31, 1979) 17
Webster's Third New International Dictionary (1986) 17

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-83

ALAN MEGHRIG AND MARGARET MEGHRIG,
PETITIONERS

v.

KFC WESTERN, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

Congress has vested federal and state authorities with primary responsibility for enforcing environmental statutes, but it has supplemented the government's enforcement powers with "citizen suit" remedies, which authorize private citizens to bring civil actions in certain circumstances. The United States has a strong interest in ensuring that a meaningful, yet appropriate, citizen suit remedy is available to private litigants.

The United States has a particular interest in the interpretation of Section 7002(a)(1)(B) of the Resource Conservation and Recovery Act (RCRA), which, un-

like the citizen suit provisions contained in other federal environmental statutes, authorizes a private party to bring a civil action in response to an "imminent and substantial endangerment to health or the environment." 42 U.S.C. 6972(a)(1)(B). Section 7002(a)(1)(B) grants citizens authority that is similar, but not identical, to the authority that Section 7003 grants to the federal government to respond to an "imminent and substantial endangerment" resulting from the handling, storage, treatment, transportation, or disposal of solid or hazardous waste. See 42 U.S.C. 6973. The United States has a strong interest in ensuring that the Court is aware of the relationship between the relevant statutory provisions.

The United States also has an interest in Section 7002(a)(1)(B) as a potential defendant in a citizen suit. Section 7002(a)(1)(B) expressly provides that "the United States and any other governmental instrumentality or agency" may be named as a defendant in a citizen action. 42 U.S.C. 6972(a)(1)(B). Citizens accordingly have a right to seek judicial relief against the federal government if its waste management activities pose an "imminent and substantial endangerment" within the meaning of RCRA.

STATEMENT

The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 *et seq.*, empowers the federal government to regulate activities respecting solid and hazardous wastes. RCRA contains a citizen suit provision that authorizes private parties to commence a civil action in response to waste activities that present an "imminent and substantial endangerment." See RCRA § 7002, 42 U.S.C. 6972. Respondent KFC Western, Inc., brought a RCRA citizen suit

against petitioners Alan and Margaret Meghrig to recover its expenses in removing hazardous waste contamination from property that it had purchased from them. The district court dismissed the suit on the ground that there was no "imminent and substantial endangerment" at the time of suit. See Pet. App. A21-A23. The court of appeals reversed, holding that a citizen may bring suit under Section 7002(a)(1)(B) in response to past endangerment and that a court may provide the citizen with a restitutionary remedy. *Id.* at A1-A20.

A. The Resource Conservation and Recovery Act

RCRA, which is also known as the Solid Waste Disposal Act, is a comprehensive environmental statute that empowers the Environmental Protection Agency (EPA) to regulate the treatment, storage, and disposal of solid and hazardous wastes "from cradle to grave." *City of Chicago* v. *Environmental Defense Fund*, 114 S. Ct. 1588, 1590 (1994); *Environmental Defense Fund* v. *EPA*, 852 F.2d 1316, 1318 (D.C. Cir. 1988), cert. denied, 489 U.S. 1011 (1989).

Subtitle C of RCRA, which includes Sections 3001 to 3013, authorizes the EPA to identify and list hazardous wastes and to promulgate standards governing generators and transporters of hazardous wastes and owners and operators of hazardous waste facilities. See 42 U.S.C. 6921-6934 (1988 & Supp. V 1993). Subtitle D, which includes Sections 4001 to 4009, authorizes standards for the regulation of nonhazardous solid wastes. See 42 U.S.C. 6941-6949. See generally *City of Chicago*, 114 S. Ct. at 1590.[1]

---

[1] Section 1004(27) of RCRA defines the term "solid waste" to include a broad range of solid, liquid, and contained gaseous materials. 42 U.S.C. 6903(27). Section 1004(5) defines the term "hazardous waste" as a subset of "solid waste" that meets certain additional criteria. 42 U.S.C. 6903(5).

Section 3008 of RCRA grants the EPA authority to enforce federal hazardous waste regulations through compliance orders, criminal penalties, and civil penalties. See 42 U.S.C. 6928. In addition, Section 7003(a) authorizes the EPA to take action with respect to imminent hazards. 42 U.S.C. 6973(a). Section 7003(a) states that

> upon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment,

the EPA may bring suit against any person who has contributed to that endangerment

> to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both.

Ibid. Section 7003(a) also provides the EPA with the additional authority, which is not available to other plaintiffs, to "take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and the environment." *Ibid.*[2]

Like other federal environmental statutes, RCRA includes citizen suit provisions. Section 7002 allows private citizens and other "persons" to bring a civil

[2] The government's enforcement powers under RCRA are similar to those contained in the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, and the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*, which also grant power to enforce statutory and regulatory requirements and to respond to imminent hazards. See CWA §§ 309 and 504, 33 U.S.C. 1319 (1988 & Supp. V 1993) and 1364; CAA §§ 113 and 303, 42 U.S.C. 7413 and 7603 (Supp. V 1993).

suit against any person alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order under the Act. See RCRA § 7002(a)(1)(A), 42 U.S.C. 6972(a)(1)(A); see also RCRA § 1004(15), 42 U.S.C. 6903(15) (defining "person").[3] But unlike other environmental statutes, RCRA also authorizes citizen actions to address imminent hazards. See RCRA § 7002(a)(1)(B), 42 U.S.C. 6972(a)(1)(B).

Section 7002(a)(1)(B) states in relevant part that "any person may commence a civil action on his own behalf" against any other person, "including the United States and any other government instrumentality or agency" who

> has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

42 U.S.C. 6972(a)(1)(B). Section 7002 also sets out the remedies that are available with respect to such

[3] The CWA and the CAA contain a nearly identical authorization. See CWA § 505(a)(1), 33 U.S.C. 1365(a)(1); CAA § 304(a)(1), 42 U.S.C. 7604(a)(1) (Supp. V 1993). Many other environmental statutes contain a similar authorization. See Toxic Substances Control Act, 15 U.S.C. 2619(a)(1); Endangered Species Act of 1973, 16 U.S.C. 1540(g)(1); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1270(a)(1); Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. 1415(g)(1); Safe Drinking Water Act, 42 U.S.C. 300j-8(a)(1); Noise Control Act of 1972, 42 U.S.C. 4911(a)(1); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9659(a)(1); Outer Continental Shelf Lands Act, 43 U.S.C. 1349(a)(1); Deepwater Port Act of 1974, 33 U.S.C. 1515(a)(1).

a suit. Section 7002(a) grants a district judge jurisdiction

> to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both.

42 U.S.C. 6972(a).

Section 7002(a) expressly states that a citizen action under Section 7002(a)(1)(B) is subject to the notice requirements and other limitations contained in Section 7002(b)(2). See RCRA § 7002(a), 42 U.S.C. 6972(a).[4] Section 7002(a)(1)(B) does not contain any analog to the EPA's power under Section 7003 to "take other action," such as issuing administrative orders, in response to the imminent hazard. See RCRA § 7003(a), 42 U.S.C. 6973(a). But in other respects, Section 7002(a)(1)(B) grants the private citizen a remedy that is similar to the EPA's remedy under Section 7003.

B. The Proceedings Below

This RCRA citizen action arises from the cleanup of contaminated property in Los Angeles, California, that is currently owned by respondent and used for the operation of a "Kentucky Fried Chicken" restaurant. Pet. App. A2. Respondent purchased the property from petitioners in September 1975. In October 1988, respondent took steps to construct the restaurant and discovered that the underground soil was contaminated with refined petroleum products, allegedly caused by past operation of a gasoline station at the site. *Ibid.* The Ctiy of Los Angeles Department of Building and Safety thereafter ordered respondent to clean up the property. Respondent completed cleanup in 1989, at a cost of $211,000. Respondent requested petitioners to reimburse those costs, but petitioners refused. *Ibid.*

On May 29, 1992, respondent brought this citizen action in federal district court to recover its cleanup costs, pursuant to RCRA Section 7002(a)(1)(B). Petitioners moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), asserting that: (1) because respondent had completed the cleanup three years earlier, there was no "imminent and substantial endangerment"; and (2) Section 7002(a)(1)(B) provides no jurisdiction for a suit to recover private cleanup costs. Pet. App. A2-A3. On September 21, 1992, the district court granted the motion to dismiss without prejudice, holding that Section 7002(a)(1)(B) "does not provide for a private damage suit" and that "there is no 'imminent' danger, a prerequisite of a private suit," because "the clean-up is done." *Id.* at A24-A25.

Respondent amended its complaint to assert that there was an "imminent and substantial endangerment" at the time of cleanup and that Section 7002(a)(1)(B) allowed a monetary recovery as a form of "equitable restitution." See Pet. App. A3. The district court dismissed the amended complaint with prejudice, ruling that Section 7002(a)(1)(B)

[4] Section 7002(b(2) basically provides (among other things) that a citizen may not commence an action: (1) prior to 90 days after the plaintiff has given notice of the endangerment to the EPA, the relevant State, and any alleged contributor; or (2) if the EPA or a State has taken specified actions to address the endangerment under RCRA or CERCLA. See 42 U.S.C. 6972(b)(2)(A), (B) and (C).

"is limited * * * to injunctive relief" and that "there is no provision for suits for damage[s] after the cleanup is done and the danger is gone." *Id.* at A21-A23.

A divided court of appeals reversed and remanded. Pet. App. A1-A20. The court ruled that Section 7002 authorizes a citizen suit if an endangerment existed as of the cleanup, even if it had been abated at the time of filing the complaint. *Id.* at A5. The court found support for its holding in an Eighth Circuit decision, *United States* v. *Aceto Agric. Chems. Corp.*, 872 F.2d 1373 (1989), which addressed the government's powers under Section 7003 of RCRA. The court specifically relied on the Eighth Circuit's statement in *Aceto* that Section 7003(a) "does not require the EPA to file and prosecute its RCRA action *while* the endangerment exists." Pet. App. A6, quoting 872 F.2d at 1383 (emphasis in original).

The court of appeals also ruled that Section 7002(a)'s grant of jurisdiction to the district courts to order "such other action as may be necessary" provides citizens with a right to recover their cleanup costs. Pet. App. A6. The court reasoned from the Eighth Circuit's decisions in *Aceto* and *United States* v. *Northeastern Pharmaceutical & Chem. Co. (NEPACCO)*, 810 F.2d 726 (1986), cert. denied, 484 U.S. 848 (1987), that the EPA is entitled to sue for restitution. It concluded that there is "no principled reason to distinguish between the relief available to the [EPA] and that available to private plaintiffs under the virtually identical statutory provisions." Pet. App. A7-A9.[5]

[5] The court stated that it would be "unfair and poor public policy" to bar private restitution actions, leaving innocent parties to pay for cleanup. Pet. App. A10. The court acknowledged that state law may provide remedies, but it suggested that those remedies are "generally inadequate because of the difficulties of proof and attendant court delays." *Id.* at A11 n.6. The court also recognized that Section 107(a)(4)(B) of CERCLA authorizes private parties to recover cleanup costs associated with the release of a "hazardous substance." See 42 U.S.C. 9607(a)(4)(B). The court observed, however, that CERCLA's exclusion of petroleum from the definition of "hazardous substance" would preclude a CERCLA cost recovery action where, as here, the cleanup involves only refined petroleum products. Pet. App. A11 n.6; see 42 U.S.C. 9601(14).

Judge Brunetti dissented. Pet. App. A12-A20. He concluded that the "unambiguous" language of Section 7002(a) "requires that the endangerment must be occurring at the time of filing suit." *Id.* at A14. He also concluded that Section 7002(a) does not authorize private cost reimbursement actions, concluding that the Eighth Circuit decisions had assumed the availability of a reimbursement remedy, without actually deciding the issue. *Id.* at A12, A13.[6]

SUMMARY OF ARGUMENT

Section 7002(a)(1)(B) of RCRA confers on private plaintiffs an important, but limited, right to obtain relief from a federal district court. It au-

[6] After the court of appeals decided this case, a divided Eighth Circuit panel ruled that Section 7002(a)(1)(B) does not authorize a private action for past cleanup costs. *Furrer* v. *Brown*, 62 F.3d 1092, 1100 (1995). The panel concluded that the court of appeals in this case had "misconstrue[d]" *Aceto* and *NEPACCO*. *Id.* at 1101. It stated that in both cases, "because the defendants did not raise the issue of subject matter jurisdiction and neither the district courts nor this Court addressed it *sua sponte*, the decisions reflect no consideration of the jurisdictional issue." *Ibid.* The panel did not address whether Section 7002(a)(1)(B) requires a present endangerment. See *id.* at 1095 n.6. The plaintiffs in *Furrer* filed a petition for rehearing and suggestion for rehearing en banc, which were denied.

thorizes a citizen to bring a private action in response to a situation that "may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. 6972(a)(1)(B). The court of appeals erred in concluding that the citizen may bring an action based on solely past endangerment. The plain language of Section 7002(a)(1)(B) requires the current existence of a potentially "imminent" danger; it does not allow a private party to bring suit in response to a situation that no longer poses any substantial threat to health or the environment. Accordingly, respondent cannot bring suit under Section 7002(a)(1)(B) to recover its past cleanup expenditures and must instead pursue the remedies that are available to property owners under state law.

In the course of reaching its decision, the court of appeals stated that Section 7002(a)(1)(B) provides a citizen plaintiff with a "restitutionary remedy." Pet. App. A6. A citizen plaintiff that has alleged a current threat of substantial endangerment, has satisfied Section 7002's other conditions for bringing a citizen suit, and has spent sums to abate a current endangerment, may be entitled to receive recompense in the action under the equitable doctrine of restitution. The Court, however, is under no obligation to resolve that issue in this case, because, as we have explained, respondent has failed to satisfy the statutory conditions for bringing a citizen suit.

ARGUMENT

SECTION 7002(a)(1)(B) OF RCRA DOES NOT PROVIDE A MECHANISM FOR A PRIVATE LANDOWNER TO SUE PRIOR OWNERS IN FEDERAL COURT TO RECOVER PAST COSTS OF REMOVING HAZARDOUS WASTES THAT NO LONGER POSE ANY DANGER AT THE SITE

A. Section 7002(a)(1)(B) Authorizes A Person To Commence A Civil Action In Response To A Current Threat Of Substantial Danger To Health Or The Environment

1. As this Court has observed in prior cases involving citizen suit provisions, "the starting point for interpreting a statute is the language of the statute itself." *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 25 (1989); *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 56 (1987). Section 7002(a)(1)(B) authorizes a private party to commence a civil action in federal court in response to specified activities that "may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. 6972(a)(1)(B). That statutory language unambiguously indicates that the suit may go forward only if it alleges a current threat of substantial danger.

Section 7002(a)(1)(B)'s carefully drawn language indicates that Congress recognized a distinction between a situation that "may present" an imminent hazard and one that posed a threat to health or the environment only in the past. Congress granted citizens a right to seek relief in federal courts to address current situations, which by their nature present the most pressing need for a judicial remedy. It did not grant citizens a right under Section 7002(a)(1)(B) to commence an action in fed-

eral court to recover the past costs of cleaning up a site that no longer presents any danger.[7]

The distinction between a past and present hazard is manifested throughout the relevant provisions of Section 7002. Section 7002(a) states that a Section 7002(a)(1)(B) action may be brought in the district in which "the alleged endangerment may occur." 42 U.S.C. 6972(a). Section 7002(b)(2)(A)(ii) provides that no action may be commenced prior to 90 days after notice to "the State in which the alleged endangerment may occur." 42 U.S.C. 6972(b)(2)(A)(ii). And Section 7002(b)(2)(B) states that no such action may be commenced if the EPA has taken specified abatement actions in response to the activities "which may present the alleged endangerment." 42 U.S.C. 6972(b)(2)(B).

If Congress had wished to authorize private citizen suits in cases involving past endangerment, it could easily have indicated that intent by extending Section 7002(a)(1)(B) to activities "which have presented or may present" an endangerment. Congress did not do so, and that omission does not appear inadvertent. Congress understood the significance of temporal distinctions. For example, it included among

[7] Congress has addressed certain aspects of cost recovery in other legislation, including CERCLA. See CERCLA § 107(a), 42 U.S.C. 9607(a) (allowing the government and private parties to recover the costs of responding to releases and threatened releases of "hazardous substances"). See also CWA § 311(f), 33 U.S.C. 1321(f) (allowing the government to recover costs of responding to discharges of oil or hazardous substances into navigable waters); RCRA § 9003(h)(6), 42 U.S.C. 6991b(h)(6) (allowing the government to recover costs of responding to petroleum leaks from underground storage tanks). Other aspects of cost recovery remain primarily the province of state law. See nn. 19-20, *infra*.

the potentially liable defendants "any *past or present* generator, *past or present* transporter, or *past or present* owner or operator * * * who *has contributed or who is contributing* to the *past or present* handling, storage, treatment, transportation, or disposal." 42 U.S.C. 6972(a) (emphasis added). Congress nevertheless provided that those defendants would be subject to a citizen suit under Section 7002(a)(1)(B) only in situations that "may present" an imminent hazard. 42 U.S.C. 6972(a)(1)(B).[8]

2. This Court's decision in *Gwaltney* provides additional support for the conclusion that Section 7002(a)(1)(B) allows a citizen suit in response to only a current threat of endangerment. *Gwaltney* involved a dispute over whether Section 505(a)(1) of the Clean Water Act, 33 U.S.C. 1365(a)(1), which authorizes citizen suits against persons "alleged to be in violation of" permit conditions, confers jurisdiction over suits for wholly past violations. The Court held that the "most natural reading of 'to be in violation' is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past

[8] The legislative history supports the natural reading of the text. Congress broadened the scope of Section 7002(a)(1)(B) through the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, § 401(a)-(b), 98 Stat. 3268-3269. The House committee report explaining those amendments states that Section 7002(a)(1)(B) "confers on citizens a limited right * * * to sue to abate an imminent and substantial endangerment" pursuant to liability standards under Section 7003, which "will complement, rather than conflict with, the Administrator's efforts to eliminate threats as to public health and the environment, particularly where the Government is unable to take action because of inadequate resources." H.R. Rep. No. 198, 98th Cong., 1st Sess. Pt. 1, at 53 (1983); see also S. Rep. No. 284, 98th Cong., 1st Sess. 55 (1983).

polluter will continue to pollute in the future." 484 U.S. at 57.[9]

Gwaltney does not provide an exact analogy to this case, because it did not deal with the same type of citizen remedy that is at issue here. *Gwaltney* addressed a statutory provision allowing citizens to enforce regulatory requirements; it did not involve RCRA's unique statutory grant of citizen authority to address "imminent and substantial endangerment."[10] The different remedies respond to quite different problems. For example, the citizen groups in *Gwaltney* brought suit to compel a meat processing plant to comply with its water pollution discharge permit. The groups could not abate the plant's violations through self-help interference in the plant's operations. By contrast, a citizen who seeks to enjoin an imminent hazard, such as a tank or pipeline leak, may have both the ability and an incentive to respond to the hazard. If the spill has invaded the citizen's own property, he may have a compelling need to abate or contain that threat himself without waiting for a court to act.

---

[9] Among other factors, the Court found persuasive the "pervasive use of the present tense throughout § 505." 484 U.S. at 59. The Court also observed that "[p]ermitting citizen suits for wholly past violations of the Act could undermine the supplementary role envisioned for the citizen suit." *Id.* at 60.

[10] The statutory provision at issue in *Gwaltney* represents the most common formulation of a citizen suit remedy. RCRA includes a similar provision authorizing suits against any person "alleged to be in violation of" any permit, standard, regulation, condition, requirement, prohibition, or order effective under RCRA. See § 7002(a)(1)(A), 42 U.S.C. 6972(a)(1)(A). See also n.3, *supra* (citing other citizen suit provisions).

Although *Gwaltney* addresses a different type of citizen remedy, the Court's decision remains relevant. Perhaps most important, it indicates that the citizen remedy must be construed with careful attention to the statutory text. Section 7002(a)(1)(B) specifically addresses potentially imminent hazards. It expressly extends a citizen remedy only to those situations in which there is a current threat of substantial endangerment. Under the "most natural reading" of the statutory language, Section 7002(a)(1)(B) does not provide a remedy in a situation in which the danger has been wholly abated. In that circumstance, the citizen plaintiff needs to look elsewhere for any available legal remedies, including remedies under state law.[11]

3. We submit that Section 7002(a)(1)(B) does not provide respondent with a remedy in this case. Respondent has alleged that an imminent and substantial endangerment was present at the property that it had purchased from petitioners and that the danger existed until respondent cleaned up the site. But respondent has not alleged that there was any threat of substantial endangerment at the site when it filed its citizen suit some three years later. See Pet. App. A3. The district court correctly concluded that respondent's claim for relief did not satisfy

---

[11] Section 7002(f) of RCRA expressly preserves state law remedies. See 42 U.S.C. 6972(f) ("Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency).").

the requirements for a citizen suit under Section 7002(a)(1)(B).[12]

Although Section 7002(a)(1)(B) does not provide a remedy in this case, it does provide an important remedy in many other situations. Section 7002(a)(1)(B) authorizes a citizen suit whenever hazardous waste activities "may present an imminent and substantial endangerment." 42 U.S.C. 6972(a)(1)(B). The lower courts have recognized that this language, by its terms, provides relief in a broad variety of circumstances.[13] In doing so, the courts have developed a cohesive body of law construing the relevant statutory terms. For example, they have held that the phrase "may present an imminent and substantial endangerment" indicates that a citizen may bring suit if there is a reasonable possibility of imminent danger.[14] They have also ruled that the

[12] The district court also indicated that respondent failed to provide 90 days' notice of suit, see Pet. App. A25, which is a mandatory condition precedent to commencing suit, under Section 7002(b)(2)(A). See *Hallstrom*, 493 U.S. at 31.

[13] See, *e.g.*, *Dague* v. *City of Burlington*, 935 F.2d 1343 (2d Cir. 1991) (city landfill), rev'd in part on other grounds, 505 U.S. 557 (1992); *Comite Pro Rescate de La Salud* v. *Puerto Rico Aqueduct & Sewer Authority*, 888 F.2d 180 (1st Cir. 1989) (factory wastes), cert. denied, 494 U.S. 1029 (1990); *Petropoulos* v. *Columbia Gas of Ohio, Inc.*, 840 F. Supp. 511 (S.D. Ohio 1993) (wastes in underground storage tank); *City of Toledo* v. *Beazer Materials & Services, Inc.*, 833 F. Supp. 646 (N.D. Ohio 1993) (wastes from coke plant).

[14] As the Second Circuit has explained, that language "does not require a showing that actual harm will occur immediately so long as the risk of threatened harm is present." *Dague*, 935 F.2d at 1355-1356. An imminent hazard "may be declared at any point in a chain of events which may ultimately result in harm to the public." *Id.* at 1356, quoting *Environmental Defense Fund* v. *EPA*, 465 F.2d 528, 535 (D.C. Cir. 1972);

specific term "imminent" refers to "the nature of the threat" regardless of when that threat initially arose and therefore allows a citizen to bring suit in response to current threats originating from past conduct that may produce future harm.[15] And they have indicated that while the threat of danger must be "substantial," that requirement will be satisfied if "there exists reasonable cause for concern for the integrity of the public health or the environment."[16]

cf. *United States* v. *Price*, 688 F.2d 204, 213-214 (3d Cir. 1982) (Section 7003 "authorizes the cleanup of a site, even a dormant one, if that action is necessary to abate a present threat").

[15] *Dague*, 935 F.2d at 1356. Cf. Staff of Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 96th Cong., 1st Sess., *Hazardous Waste Disposal* 32 (Comm. Print 96-IFC 31, 1979) ("Imminence in [Section 7003] applies to the nature of the threat rather than identification of the time when the endangerment initially arose. The section, therefore, may be used for events which took place at some time in the past but which continue to present a threat to the public health or the environment."). The term "imminent" endangerment denotes a current hazard, see *Webster's Third New International Dictionary* 1130 (1986) (defining "imminent" as "ready to take place; near at hand; impending" and "hanging threateningly over one's head; menacingly near"), but it does not require current harm. In the case of environmental hazards, where current exposure may produce delayed incidences of cancer, birth defects, or mutagenic disorders, a danger can be "imminent" even though the actual harm "may not be realized for years." *United States* v. *Conservation Chem. Co.*, 619 F. Supp. 162, 193-194 (W.D. Mo. 1985).

[16] *United States* v. *Valentine*, 856 F. Supp. 621, 626 (D. Wyo. 1994). See also *Conservation Chem. Co.*, 619 F. Supp. at 194 ("the word 'substantial' does not require quantification of the endangerment (e.g., proof that a certain number of persons will be exposed, that 'excess deaths' will occur, or that a water supply will be contaminated to a specific degree)";

Section 7002(a)(1)(B) does not provide a remedy in the situation presented here, where the plaintiff has taken self-help action that completely eliminates a threat of substantial danger. That situation is not the one that Congress envisioned in enacting the citizen suit provisions. In most cases of substantial endangerment warranting federal relief, the perils posed by hazardous waste contamination cannot be eliminated instantaneously. A plaintiff who diligently pursues his legal rights should be able to commence a citizen action before a long-term cleanup can be fully implemented.[17] A plaintiff who undertakes some abatement efforts while pursuing his legal remedies does not forfeit the right to seek judicial relief under Section 7002(a)(1)(B) as long as a threat of substantial endangerment exists when the suit is filed.[18]

There may be situations in which a plaintiff must take immediate action to protect his own property from contamination and in doing so completely abates a threat of substantial endangerment that would otherwise be actionable. Those situations, however, are likely to involve hazards of limited scope and entail expenses that are recoverable under traditional

rather, "an endangerment is substantial if there is reasonable cause for concern that someone or something may be exposed to a risk of harm by a release or a threatened release of a hazardous substance if remedial action is not taken").

[17] In this case, KFC learned of the hazardous situation (which had existed since 1975) in October 1988. It did not complete its cleanup (which cost in excess of $200,000) until some time in 1989. See Pet. App. A2.

[18] As we explain below, a plaintiff that has been forced to take emergency action but has not completed cleanup of the longer term danger may be entitled, in appropriate circumstances, to reimbursement of its expenses in a RCRA citizen suit. See pp. 22-28, *infra*.

state law principles. For example, state law commonly provides a plaintiff with a remedy for "reasonable measures to remedy a nuisance."[19] A landowner may also have rights to cost recovery as a successor owner of property based on theories such as breach of warranty or fraudulent concealment.[20]

[19] *Stratford Theater, Inc.* v. *Town of Stratford*, 101 A.2d 279, 281 (Conn. 1953) (flooding from sewer pipe) ("Where * * * the owner takes reasonable measures to remedy the nuisance and prevent further injury, he is entitled to recover, as an element of damages, the reasonable cost of the measures he takes."). See also, *e.g.*, *Drouin* v. *Ridge Lumber, Inc.*, 619 N.Y.S.2d 433, 434-435 (N.Y. App. Div. 1994) (discharge of fuel) ("Plaintiffs were properly granted summary judgment declaring and holding defendant liable * * * for all cleanup and removal costs [incurred by plaintiffs] * * * resulting from defendant's discharge of gasoline."); *Amax, Inc.* v. *Sohio Indus. Prods. Co.*, 469 N.Y.S.2d 282, 284 (N.Y. Sup. Ct. 1983) (radioactive contamination) ("The abatement of the nuisance does not affect the right to recover damages for its past existence."); *Pollard* v. *Land West, Inc.*, 526 P.2d 1110, 1114 (Idaho 1974) (sewage contamination) (recovery of costs of drilling well to abate sewage nuisance); *Earl* v. *Clark*, 219 N.W.2d 487, 490 (Iowa 1974) (cattle manure) ("It is also understood the special damages which may be allowed include reasonable costs attendant upon removal of offensive nuisance deposits."); *Burk* v. *High Point Homes, Inc.*, 197 N.Y.S.2d 969, 972 (Sup. Ct.) (tons of highly piled loose dirt and sand) ("[D]efendant is * * * liable for damages to the plaintiffs' properties," including "the cost of removal of the defendant's dirt, sand and mud."), appeal dismissed, 205 N.Y.S.2d 862 (N.Y. App. Div. 1960); *Sheridan Oil Co.* v. *Wall*, 103 P.2d 507, 510 (Okla. 1940) (crude oil leakage) ("The rule as to recovery of 'temporary' damages assumes either that the defendant by reason of successive suits against him will be compelled to remove or abate the [nuisance] * * * and where plaintiff abates the nuisance, he is entitled to recover his reasonable expenses thereby incurred.").

[20] See *Roadmaster Indus., Inc.* v. *Columbia Mfg. Co.*, 893 F. Supp. 1162 (D. Mass. 1995) (allowing suit for contract

As the court of appeals noted (Pet. App. A11 n.6), respondent currently has an action pending in state court. See *KFC Western, Inc.* v. *Meghrig*, 28 Cal. Rptr. 2d 676 (Cal. Ct. App. 1994).

The text of RCRA indicates that Congress recognized the availability of state law remedies and supported their use in response to dangers posed by hazardous wastes. See RCRA § 7002(f), 42 U.S.C. 6972(f) (preserving state law remedies). Congress's explicit preservation of those remedies manifests its belief that state law adequately addresses situations that fall outside of Section 7002's scope. Furthermore, there is no reason to expect that duties imposed by federal law will be ignored in the application of state remedies. To the contrary, state courts are under an obligation to take into account RCRA's environmental standards and requirements when applying their state remedies. See, *e.g.*, *Testa* v. *Katt*, 330 U.S. 386, 393 (1947) ("the policy of the federal Act is the prevailing policy in every state").[21]

---

rescission and tort damages for sale of contaminated property); *Mailman's Steam Carpet Cleaning Corp.* v. *Lizotte*, 616 N.E.2d 85 (Mass. 1993) (costs to clean up underground oil tanks awarded under breach of warranty claim). A nuisance action may be available in actions between a purchaser and former lessee. See *Wilshire Westwood Assocs.* v. *Atlantic Richfield Co.*, 24 Cal. Rptr. 2d 562, 569-570 (Cal. Ct. App. 1993) (holding plaintiffs entitled to seek recovery for damages in nuisance against former lessees who contaminated the property).

[21] The court of appeals' suggestion that state law remedies will be inadequate in light of "difficulties of proof and attendant court delays" (Pet. App. A11 n.6) is open to question. In any event, those concerns do not provide an adequate basis for creating a federal cause of action that Congress did not provide. Cf. *Thompson* v. *Thompson*, 484 U.S. 174, 187 (1988).

More generally, the result that we urge is consistent with the statutory objectives that Congress sought to achieve through the citizen suit mechanism. Congress created a citizen remedy to supplement federal enforcement efforts in order to bring about compliance to protect public health and safety, not to provide a private cause of action that merely duplicates state law remedies in disputes between individuals.[22] Just as a citizen suit cannot go forward if the government is appropriately responding to the hazard, RCRA § 7002(b)(1)(B), 42 U.S.C. 6972(b)(1)(B), the suit should not proceed if the alleged hazard has been completely abated prior to suit. See *Price* v. *United States Navy*, 39 F.3d 1011, 1019-1021 (9th Cir. 1994). Section 7002(a)(1)(B) provides no basis for reaching a different result simply because the citizen plaintiff, rather than someone else, has eliminated the potential endangerment.[23]

---

[22] See H.R. Rep. No. 198, *supra*, at 53; S. Rep. No. 284, *supra*, at 55, 57. Section 7002(b)'s statutory notice requirement and other limitations on citizen suits reflect Congress's overarching concern that the citizen suit complement federal enforcement efforts. See RCRA § 7002(b), 42 U.S.C. 6972(b). See also *McClellan Ecological Seepage Situation* v. *Perry*, 47 F.3d 325, 328-329 (9th Cir. 1995) (explaining that if the government initiates a CERCLA cleanup, CERCLA itself precludes a citizen plaintiff from seeking RCRA relief at the site), cert. denied, No. 94-1807 (Oct. 2, 1995).

[23] As the court of appeals recognized, the citizen's remedy under Section 7002 and the government's remedy under Section 7003 are similar in many respects. See Pet. App. A7; see also H.R. Rep. No. 198, *supra*, at 53 (stating that Section 7002 confers a limited right to sue to abate an endangerment "pursuant to the standards of liability established under Section 7003"); S. Rep. No. 284, *supra*, at 55-57 (accord). The Court should be aware, however, that the federal government's remedy is broader than the citizen's remedy. Section

B. A Citizen Plaintiff That Properly States A Cause Of Action Under Section 7002(a)(1)(B) May Invoke The Court's Traditional Equitable Powers To Obtain Appropriate Relief

1. This Court has stated on numerous occasions that if Congress grants a district court authority to provide equitable relief, the court may exercise "all the inherent equitable powers" of traditional equity jurisdiction, including the power to order restitution. *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946); *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 313 (1982); *United States* v. *Moore*, 340 U.S. 616, 618-620 (1951); *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944). See also *Mertens* v. *Hewitt Assocs.*, 113 S. Ct. 2063, 2069 (1993) (" 'equitable relief' can also refer to those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages")).

7003(a) grants the EPA authority to take "other action * * * including, but not limited to, issuing such orders as may be necessary to protect public health and the environment." 42 U.S.C. 6973(a). Thus, the EPA may act to protect the public welfare without invoking the jurisdiction of the courts. Furthermore, the government may be entitled to restitution for the costs of such action. See *Wyandotte Transp. Co.* v. *United States*, 389 U.S. 191, 204-205 (1967) (recognizing the government's right to restitution for abatement actions under the Rivers and Harbors Appropriation Act of 1899). The federal rule in *Wyandotte* reflects the familiar principle that public agencies and municipalities may recover the costs of abating public nuisances. *City of Paterson* v. *Fargo Realty Inc.*, 415 A.2d 1210, 1216-1217 (N.J. Dist. Ct. 1980) (recovery of costs through imposition of lien or a personal judgment against property owner); *Brandon Township* v. *Jerome Builders, Inc.*, 263 N.W.2d 326, 327 (Mich. Ct. App. 1977) (recovery of costs through assessment against property); *Oberst* v. *Mays*, 365 P.2d 902, 904 (Colo. 1961) (recovery of costs through assessment against property). Issues respecting the reach of Section 7003 are not before the Court in this case.

The Court's decision in *Porter* addressed Section 205(a) of the Emergency Price Control Act of 1942, ch. 26, 56 Stat. 33; 50 U.S.C. App. 925(a) (1946). That Act provided that if the Administrator of the Office of Price Administration made a showing of a price control violation to the appropriate district court, "a permanent or temporary injunction, restraining order, or other order shall be granted without bond." 328 U.S. at 397. The Court concluded that the phrase "other order" included an order for the restitution of illegal rents. *Id.* at 399. The Court reasoned that unless the underlying statute provided otherwise, the district court was entitled to exercise "all the inherent equitable powers" in providing an appropriate remedy. *Id.* at 398.

The Court explained that "the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command." 328 U.S. at 398. It laid down the following principle:

> Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." *Brown* v. *Swann*, 10 Pet. 497, 503.

Ibid. The Court held that restitution may be granted either as "an equitable adjunct to an injunction decree" or as "an order appropriate and necessary to enforce compliance with the Act." *Id.* at 399-400. As to the latter, "inherent equitable jurisdiction * * * clearly authorizes a court, in its discretion, to decree

restitution of excessive charges in order to give effect to the policy of Congress." *Id.* at 400.

The Court reached a similar result in *Moore*, which held that a court could order restitution of rent overcharges under Section 206(b) of the Housing and Rent Act of 1947, ch. 163, 61 Stat. 199-200; 50 U.S.C. App. 1986(b) (1958). That Act authorized courts to grant a permanent or temporary injunction, restraining order, "or other order" in response to a showing of an actual or threatened rent control violation. 340 U.S. at 618-619. The Court concluded that restitution "clearly enforces compliance with the Act" and that Section 206(b) is not confined to securing prospective adherence to the law. *Id.* at 620.

The principles that this Court articulated in *Porter* and *Moore* are well established, and they have been applied as a matter of course in cases involving the exercise of equitable powers. See, *e.g.*, *Romero-Barcelo*, 456 U.S. at 313. The Court's decision in *School Committee of Town of Burlington* v. *Department of Education*, 471 U.S. 359 (1985), reflects a similar conception of a federal court's equitable powers. The Court there concluded that the Education of the Handicapped Act, 20 U.S.C. 1415(e)(2), which authorizes courts to "grant such relief as the court determines is appropriate," confers power to order school authorities to reimburse parents for private school expenses. 471 U.S. at 369. The Court reasoned that the statutory provisions confer "broad discretion on the court" and require only that "the relief is to be 'appropriate' in light of the purpose of the Act." *Ibid.*

2. Section 7002(a) of RCRA grants the district courts the power

> to restrain any person who has contributed or who is contributing to [the solid or hazardous waste activities] referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both.

42 U.S.C. 6972(a). That Section clearly confers equitable power, and neither Section 7002(a) nor any other provision of RCRA contains any "clear and valid legislative command" restricting the district courts' exercise of traditional equitable authority. See *Romero-Barcelo*, 456 U.S. at 313; *Porter*, 328 U.S. at 398. To the contrary, by authorizing district courts to order responsible persons "to take such other action as may be necessary," Congress evinced an intent to confer the full scope of equitable jurisdiction.

Under this Court's decisions in *Porter* and *Moore*, Section 7002(a)'s authorization to "restrain" and "order * * * such other action as may be necessary" draws on "all the inherent equitable powers," including the power to order restitution. *Porter*, 328 U.S. at 398-399. Restitution, which provides a remedy for "unjust enrichment," is a familiar form of equitable relief. See 1 D. Dobbs, *Law of Remedies* § 4.1(1) at 551-552, 556-557 (2d ed. 1993); *Restatement of Restitution* § 1 (1937). That remedy may be "appropriate and necessary" in some circumstances to ensure the effectiveness of a citizen suit. See *Porter*, 328 U.S. at 400.

Of particular relevance here, a court may award restitution to provide reimbursement for "performance of another's duty to the public." *Restatement of Restitution* § 115 (1937). Section 115 specifically states:

> A person who has performed the duty of another by supplying things or services, although acting without the other's knowledge or consent, is entitled to restitution from the other if

(a) he acted unofficiously and with intent to charge therefor, and

(b) the things or services supplied were immediately necesary to satisfy the requirements of public decency, health, or safety.

Federal and state courts have awarded a restitutionary remedy in a variety of such circumstances.[24]

A court must, of course, examine the specific facts to determine whether restitution is warranted and in what amount. Restitution is not the equivalent of a damages remedy.[25] It generally is not available to a party who, "incidentally to the performance of his own duty or to the protection or the improvement of his own things," confers a benefit on another. *Restatement of Restitution* § 106 (1937).[26] Furthermore, restitution generally will not be awarded "unless the person having the duty has been first requested to perform it, except where such request would be useless because the one having the duty has indicated an intent not to perform or where time limitations prevent the making of such a request." *Restatement of Restitution* § 115 cmt. a (1937).[27]

Indeed, RCRA's citizen suit provisions impose a 90-day notice requirement that is consistent with that principle of restitution. Section 7002(b)(2)(A)(iii) provides that, as a precondition to suit, a citizen plaintiff must give notice of its intent to sue to any person "alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste." 42 U.S.C. 6972(b)(2)(A)(iii). A primary purpose of providing notice is to give the recipient an opportunity to take action on its own and thereby "render unnecessary a citizen suit." *Gwaltney*, 484 U.S. at 60; *Hallstrom*, 493 U.S. at 29. Hence, a person who receives notice but thereafter fails or declines to abate the endangerment may be liable in restitution under traditional equitable principles.

Thus, in appropriate circumstances, an award of restitution would be proper in the citizen suit context. As we have explained, Congress authorized citizen actions "to abate imminent and substantial endangerments" as a complement to the EPA's authority to address imminent hazards under Section 7003. If persons responsible for creating public health hazards could ignore a duty to abate those hazards, free from any obligation of recompense to those who take necessary response actions on their

---

[24] See, *e.g.*, *Wyandotte Transp. Co.*, 389 U.S. at 204, citing *Restatement of Restitution* § 115; *State* v. *Schenectady Chems., Inc.*, 479 N.Y.S.2d 1010, 1014 (N.Y. App. Div. 1984) (recognizing the State's cause of action for restitution for cleaning up waste contamination, notwithstanding the State's statutory enforcement duties); *Brandon Township*, 263 N.W.2d at 328 (cause of action for restitution, under *Restatement of Restitution* § 115, where Township repaired privately owned dam to address "imminent threat" of rupture and flooding).

[25] In cases where the recipient has abated a hazard, restitution is generally "limited to the reasonable costs for abatement, not necessarily the amount expended, and does not extend to future costs." *Schenectady Chems., Inc.*, 479 N.Y.S.2d at 1014.

[26] For example, under that Section of the Restatement, a private plaintiff that is itself responsible under RCRA Section 7002(a)(1)(B) to clean up an imminent and substantial endangerment or is under some other legal duty to perform the cleanup may not be entitled to restitution.

[27] See *Town of Hooksett School Dist.* v. *W.R. Grace & Co.*, 617 F. Supp. 126, 134 (D.N.H. 1984); *Hebron Public School Dist. No. 13* v. *U.S. Gypsum*, 690 F. Supp. 866, 869 (D.N.D. 1988).

behalf, the responsible parties would evade their legal obligations and innocent citizens would be unfairly penalized for assisting the government's abatement efforts. See *Wyandotte Transp. Co.* v. *United States*, 389 U.S. 191, 204 (1967) (concluding that restitution was necessary to avoid "the result, extraordinary in our jurisprudence, of a wrongdoer shifting responsibility for the consequences of his negligence onto his victim").[28]

3. In light of the foregoing principles, there should be little doubt that a federal court is empowered to award restitution under Section 7002(a)(1)(B) in appropriate circumstances. The question whether to provide that remedy in any particular case requires a careful examination of the facts and a principled exercise of remedial discretion. See generally *Restatement of Restitution* Ch. 1, introductory note at 11 (1937). This Court, however, need not address any of those issues in this case. The court of appeals erred in concluding that respondent qualified to seek relief in a citizen suit under Section 7002(a)(1)(B). That error requires reversal of the court of appeals' decision and renders hypothetical the question of what remedies would be available if respondent had stated a valid claim for relief.

---

[28] As we have explained, a person who abates a nuisance, but does not satisfy the preconditions for Section 7002(a) relief, would normally be entitled to pursue traditional remedies, including restitution, under state law. See pp. 18-20 & nn.19-20, *supra*. There is no reason why a person who *does* satisfy those preconditions should—by contrast—be denied a restitutionary remedy, which is a familiar form of equitable relief under both federal and state law.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

ANNE S. ALMY
JOHN T. STAHR
Attorneys

NOVEMBER 1995

☆ U. S. GOVERNMENT PRINTING OFFICE: 1995 405017 40002

Supreme Court, U.S.
FILED
NOV 9 1995
CLERK

(6)

No. 95-83

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

Alan Meghrig
and Margaret Meghrig,
Petitioners

vs.

KFC Western, Inc.,
Respondent

~~MOTION FOR LEAVE TO FILE AMICUS BRIEF~~
AND AMICUS CURIAE BRIEF OF

SOUTHERN CALIFORNIA SERVICE
STATION ASSOCIATION

Dimitri G. Daskalopoulos
3 Church Circle
Suite 500
Annapolis, MD. 21401
(301) 261-8480
Counsel of Record
for Amicus Curiae

BEST AVAILABLE COPY

43 pp

QUESTIONS PRESENTED

1. Whether the citizen suit provision of RCRA, 42 U.S.C. 6972 (a)(1)(B), which authorizes district courts to restrain persons who have contributed to contamination or to 'order such persons to take such other action as may be necessary", also authorizes a private party suit for reimbursement of clean up costs, despite the absence in RCRA, unlike CERCLA and other statutes of any express language authorizing such an action.

2. Whether the citizen suit provision of RCRA, 42 U.S.C. 6972 (a)(1)(B), which only permits suits against persons who have contributed to the generation, transport or disposal of solid or hazardous waste "which may present an imminent and substantial endangerment to health or the environment" authorizes a citizen suit for contamination that was fully remediated at least 3 years before the action was commenced.

TABLE OF CONTENTS

Questions Presented. I

Table of Contents... II

Table of Authorities.. III

Interest of Amicus and Summary of Argument ... 1

ARGUMENT..... 12

I. The 9th Circuit Decision is Based upon Erroneous Assmptions 14

II. The Plain Langauge of the Statute ...18

III. Nothing In The Legislative History Supports the Creation of This Implied Cause of Action ...25

IV. If Such a Cause of Action Exists, It Is Limited To Imminent and Substantial Endangerments ...31

V. Conclusion ... 34

TABLE OF AUTHORITIES

CASES

California v. ARC America,
490 U.S. 93 (1989)... 43
Campbell v. Hussey
368 U.S. 297 (1961)....9
Cippolone v. The Liggett Group,
510 U.S.____, 112 S.Ct. 2608..32,33
Darling v. Mobil Oil Corp.
864 F.2d 981 (2nd Cir. 1989)...37,38
Esso Standard Oil Company v. Dept. of Consumer Affairs,
793 F.2d 431 (1st Cir. 1985)
.34,35,36,37,38
Jiminez v. BP Oil Co.;
853 F.2d 268 (4th Cir. 1988)....3,4
Lippo v. Mobil Oil Corp.
776 F.2d 706, (7th Cir. 1985)... 14
Morales v. Trans World Airlines,
510 U.S. ,112 S.Ct. 2031 (1992).. 12
O'Melveny and Myers v. FDIC,
512 US___, 129 L.Ed 2d 67 (1994)
.....14,17,39
Shaw v. Delta Airlines
463 U.S. 85 (1985)..... 11, 12
Slatky v. Amoco Oil Co.,
830 F.2d 476(3rd Cir.in banc 1987)
.....25
Wingard v. Exxon Co. USA,
819 F.Supp 473 (D. S.C. 1993)
..... 43

STATUTES & LEGISLATIVE HISTORY

15 USC 2802 (a).. 3,27
15 USC 2802 (b)..... 5
15 USC 2802 (b)(2)(a) ...8
15 USC 2802 (b)(2)(C)....7

15 USC 2802(c) (11).....7
15 USC 2805 6
15 USC 2806 6,28,29

1978 U.S.Code Cong. & Ad. News 873
..... 20,27,29,30
Cong. Record
April 5, 1977 p. 10378,83 .....
25,26
Hearings on HR13000 before the Subcommittee on Energy and Power of the Committee on Interstate and Foreign Power (94th Cong., 2d Sess.),
.....24,25
Public Law No. 103-371(1994)
.... 13,15,20

VA. CODE ANN. 59.1-21.14..... 23
VA. CODE ANN. 59-1.21.15.....24

MISCELLANEOUS

1994 National Petroleum News Factbook.
..... 2
"Judicial Interpretation of the Petroleum Marketing Practices: Conflict and Diversity." 32 Emory L.J.273 (1983).....1

L.Tribe, American Constitutional Law , 2nd Ed 1988.....31,32

STATEMENT OF THE CASE

Amici hereby adopt the statement of the case as shall be set forth in Petitioner's brief on the merits.

INTRODUCTION AND INTEREST OF AMICUS

Amicus, the Southern California Service Station Dealers Association, represents the interests of gasoline retailers throughout the region, a region which is the largest single petroleum market in the world.

The activities of the gasoline retailers represented by the Association have been extensively regulated by RCRA since 1984 Amendments became effective.

The interpretation of RCRA, especially with respect to underground storage tanks , is of tremendous

concern to the Association.

If the interpretation of the 9th Circuit is upheld, the practical impact on our members would go far beyond the legal implications.

In particular, if upheld, the ruling would hurt our members ability to obtain investment capital, and would <u>substantially</u> drive up our costs of dealing with the RCRA regulated substances that are at the heart of the daily operation of a modern service station.

Moreover, if upheld, the ruling would effectively repeal EPA's newly promulgated underground tank lender liability rule. 60 Fed. Regis. 46692 (Sept. 7, 1995).

EPA explained the need for the

rule:

" Until now, EPA believes that concerns over environmental liability have made a significant number of lenders reluctant to make loans to otherwise credit-worthy owners and operators of UST's. The free flow of credit to UST owners (many of whom are small entities and that may rely on secured financing mechanisms for capital){such as our members}, is expected to assist UST owners and operators in meeting their obligations to upgrade, maintain, or otherwise comply with RCRA Subtitle I and other environmental requirements.

Conversely, the lack of such capital may adversely affect the ability of an UST owner to meet its obligations under subtitle I **with concomitant adverse environmental impacts from UST's and UST systems, that are out of compliance due to the lack of financing to make the necessary improvements.** 60 Fed. Regis. at 46692, 46693.

It is extremely important that the Court be aware that the major reason EPA believes the tank lender liability rule will withstand scrutiny is the absence of a private damage

action under RCRA subtitle I; whereas a similar rule under CERCLA was struck down by the D.C. Circuit in Kelley, et.al. v. EPA, No. 93-1312, 23 F.3rd 132.

EPA explains:
" The Court held that "EPA lacked statutory authority to restrict by regulation private rights of action under the statute....
Whereas CERCLA contains a provision regarding private rights of action, there is no explicit provision for private rights of action contained under RCRA Subtitle I. "

This ruling reverses that well settled principal, a principal that has been relied upon by both regulators and the regulated community.

The importance of the rule to our members, a rule put in jeopardy by the 9th Circuit ruling, compels us to seek reversal.

A review of the history of regulation of underground storage tanks, shows why creation of this new federal cause of action by the 9th Circuit is particularly inappropriate.

Prior to 1983, gasoline underground storage tanks were largely out of sight and out of mind.

Those instances where leakage had occurred were dealt with under state law, under a variety of theories, ranging from strict liability, See, e.g., Yommer v. McKenzie, 255 Md. 220, 257 A.2d 138 (Md. 1969), to trespass and nuisance.

A series of highly publicized leaks, in particular, one at Canoe Park, Rhode Island, that ended up on the TV show "60 Minutes", spurred

calls for Congressional action.

Members of Congress were told by the EPA that it lacked authority under existing statutes to reembodied leaking underground storage tanks ("LUSTS").

In particular, Superfund (CERCLA) could not be used, because gasoline falls within the "petroleum exclusion" found at 42 U.S.C. 9614. See generally, Wilshire Westwood Associates v. Atlantic Richfield Co., 881 F.2d 801 (9th Cir. 1991).

As a result, two bills amending CERCLA were introduced in that 98th Congress, H.R. 4761 by Rep. Ritter, and S. 2513 by Sen. Durenberger, that shared two common objectives:

(1) to repeal the petroleum exclusion

and allow Superfund authority to be used in leaking tank cases and (2) to authorize EPA to establish regulations for UST's.

Amicus, represented by Counsel of Record, and our national organization, the Service Station Dealers of America, were key players in the ensuing legislative debate.

The industry viewed repeal of the petroleum exclusion as a costly disaster in the making. If gas stations were hung with the "Superfund Site" label, investment capital and liability insurance would disappear, and the cost of handling our products would skyrocket.

On the other hand, regulation was viewed as a sensible step.

As a result, a consensus was reached which enabled a regulatory program to be established under Subtitle I of RCRA created by the 1984 Amendments. See generally, House Report 98-1133, 98th Cong., 2nd Sess. (1984).

Nevertheless, a Congressman or Senator with a tank leak in his or her district could not call EPA and request a federal response to a tank leak.

The next Congress saw proposals to partially lift the petroleum exclusion, 42 USC 9614, by defining releases from petroleum underground tanks as hazardous substances. See, Section 101 of HR 2560 (99th Cong. 1st Session)(by Rep. Florio).

As with the proposals to repeal the petroleum exclusion in its entirety, the Florio proposal was killed in subcommittee, despite the fact that Rep. Florio was the Chairman.

It is instructive to note that had any of these proposals passed, then a federal cause of action for cost recovery would exist.

The fact that they did not pass shows that the 9th Circuit ruling lacks merit.

The 99th Congress again decided not to subject this critical industry to the " Superfund Stigma ".

Under Section 205 of the 1986 Superfund Amendments and Reauthorization Act (SARA) a

comprehensive financial responsibility scheme was established, along with creation of the federal leaking underground storage tank trust fund. See, 42 U.S.C. 6991b.

Although a Superfund bill was used as the vehicle, the fund was created under RCRA, primarily because of the desire to keep tanks out of the mess that Superfund had turned into. See generally, House Report # 99-962, (99th Cong. 2d Session) (The conference report on SARA.)

The net result of the legislative debate was to create a comprehensive regulatory scheme, See 60 Fed. Regis. 46693- 46694, and 40 CFR 280, 281, that EPA was authorized to, and in fact has, "franchised" to the states

under 42 USC 6991c.

For purposes of this case, the key provisions are those dealing with corrective action, financial responsibility, and the federal and state funds.

EPA's financial responsibility regulations (40 CFR part 280 subpart H) require UST owners and operators to maintain an annual aggregate of financial assurance of 1 million or 2 million, depending on the number of UST's owned.

The method of demonstrating financial assurance most relied upon nationwide is the 41 state tank trust funds.

California has a tank fund set up on the authority of the Section

25299.10 of the Health and Safety Code.

That fund, like others, was set up because of the unavailability of insurance, see, Cal. Health & Safety Code 25299.10 (b)(4) and provides reimbursement for eligible claimants.

It was also designed so that California could obtain its "tank franchise" from EPA, and enacted to further

" the interest of the people of the state in order to avoid <u>direct federal regulation</u>, of persons already subject to state law...Cal. Health & Safety Code 25299.10 (b)(10).

The 9th Circuit was wrong to find an implied federal cause of action in this area, which has always been a matter of state law.

<u>ARGUMENT</u>

As a threshold matter, SCSSA believes the time has come for the Court to refine the analysis under Cort v. Ash 422 U.S. 66 (1975), as to when an implied cause of action is available under a federal statute.

Specifically, we believe that where the statute does not expressly provide for the cause of action or relief sought, there must exist a clearly articulated and affirmatively expressed intent in the legislative history to affirmatively create such a cause of action.

If this threshold inquiry is not met, then federal courts should not be required to engage in the analysis under the other three factors enunciated in Cort.

As demonstrated, infra, this test cannot be met, therefore then decision below should be reversed on this basis alone.

I. The 9th Circuit Decision is Based Upon Erroneous Assumptions

The basis of the 9th Circuit decision is an assumption that to rule against an implied right of action for contribution under RCRA would leave the plaintiffs without a remedy, and thus would be "bad public policy".

The fact is that state law has always provided the remedies for our members, who have more experience with petroleum contaminated properties than anyone else.

More importantly, due to the requirements of RCRA that underground tank owners and operators be able to

demonstrate financial responsibility , (See, 40 CFR Part 280 Subpart H), and the unavailability of underground tank insurance for small businesses such as those operated by our members (See, Federal Register of Dec. 23, 1991, delaying starting date of financial responsibility regulations), California and 41 other states have created underground tank clean up funds.

They are designed to reimburse petroleum tank clean up costs such as those at issue in this case.

The 99th Congress used the Superfund reauthorization process to create a leaking underground storage tank (LUST) trust fund in RCRA, by amending Subtitle I.

The statute expressly limits the right of cost recovery from the federal fund to EPA or the states.

Neither service station dealers, who pay the tax that finances the fund, nor any other private party are allowed to tap into the federal fund for reimbursement, rather cost recovery is limited to EPA and the states. 42 U.S.C. 6911b(6)(a).

The reimbursement issue has quite properly been handled by the states, and claims for reimbursement have been, and continue to be made to state tank funds in California and 41 other states, and the full range of legal remedies under state law will continue to be available to our members, who buy more contaminated property than

anyone else, as well as to others.

What the 9th Circuit majority saw as bad public policy, was in fact a carefully crafted legislative response, that has created an award winning program and a model federal - state partnership.

In this case, the bad public policy would come about through legislating from the bench, based upon the erroneous assumption that the Respondent, or similarly situated persons would be left without a remedy.

The second erroneous assumption made by the 9th Circuit majority is that the same remedies available to the EPA Administrator should also be available in a citizens suit. 49 F.3rd

@ 521-522.

In Furrer v. Brown, 62 F.3rd 1092, 1100, the 8th Circuit aptly described this argument as a non sequitur.

As previously noted, the 1986 Superfund Amendments created the federal Underground Storage Tank Trust Fund, but limited cost recovery to costs incurred by " the Administrator or by a State" . 42 USC 6991b (6)(a).

Neither the general language of RCRA, nor the specific language of the Underground Tank Program created by Subtitle I thereof; authorize the relief sought by the Respondent.

II. THE PLAIN LANGUAGE OF THE STATUTE

In pertinent part, 42 U.S.C.

6972(a)(1)(B) allows any person to maintain a civil suit :

" on his own behalf against any past or present generator, transporter or past or present operator of a treatment, storage or disposal facility who has contributed or is contributing to the past or present to the past or present handling, storage, treatment or disposal of any solid or hazardous waste <u>which may present an imminent and substantial endangerment to health or the environment...</u>

The district court shall have jurisdiction to ... enforce permits and other requirements, to restrain any person who is contributing to the past or present handling, storage, treatment, transportation or disposal of any solid or hazardous waste...
<u>to order such person to take such other action as may be necessary</u>, or both..."

The 9th Circuit majority attempted to support its holding by relying on the term <u>" order such person to take such other action as may be necessary "</u> with respect to solid or hazardous waste that is

posing an imminent and substantial endangerment to health or the environment.

We believe the key is the term "necessary".

SCSSA fails to see how it is "necessary" to award damages under federal law in order to have a potentially responsible party abate an imminent and substantial endangerment.

In its analysis of the Cort v. Ash factors in Furrer, the 8th Circuit noted that a persuasive argument can be made that the Furrers, (as well as respondent KFC Western herein), are in a class of persons that 42 USC 6972 is directed against - owners of a storage facility where hazardous waste has presented an imminent and substantial

endangerment. 62 F.3rd @ 1092.

The key point is the carrot of a potential damage award under RCRA is not what would motivate a service station operator or owner of a leaking tank to take action; it is the stick of "corrective action" mandated by 42 U.S.C. 6991b(h)(2) et. seq.; which is backed up by the threat of heavy fines and even criminal prosecution in some cases under state (See, e.g. Cal. Health and Safety Code Sec. 25299) or federal law if the action is not taken.

Thus, to characterize potential damage awards made by federal courts under RCRA as "action necessary" defies logic and common sense.

Additionally, to the extent that

"carrots" are relevant at all, those carrots exist in the form of the ability of owners and operators who have complied with the applicable UST regulations to seek reimbursement under state funds.

We would also note that the 9th Circuit fails to take account of the fact that there are thousands of orphan tank sites where a responsible party either cannot be found, or those that can be found lack the ability to pay.

In these cases the citizen suit/ damage carrot is illusory, and Congress did not delude itself into thinking that citizen suits seeking damages from non-existent or incapacitated parties are "necessary"

to fulfill the statutory objective.

Instead, Congress created the "LUST Trust Fund", in large part to deal with such orphan sites.

The fact that a private party has no right to tap into the federal Trust Fund is telling evidence of two facts: (1) that the federal cause of action implied by the 9th Circuit does not exist and (2) that an implied federal cost recovery cause of action can not be justified on the basis that it is "action necessary" to ensure the abatement of imminent and substantial hazards to health or the environment.

Simply put, if Congress had intended to allow the relief sought, it would have done so in the plain language of the statute.

The failure of efforts to do so such as the effort to repeal the CERCLA petroleum exclusion failed.

Significantly, in the same legislation that created the federal tank fund, the 1986 Superfund Amendment and Reauthorization Act, (SARA), Congress expressly provided that private parties such as Respondents could seek cost recovery for " **necessary costs of response incurred by any other person consistent with the National Contingency Plan.** " 42 U.S.C. 6907(a)(2)(B).

As discussed in detail, supra, during that debate, Congress rejected proposals that would have partially lifted the " petroleum exclusion ", 42

USC 9614, to Superfund by defining releases from petroleum underground tanks as hazardous substances. See, Section 101 of HR 2560 (99th Cong. 1st Session)(by Rep. Florio).

Had the petroleum exclusion to Superfund been fully or partially removed, then CERCLA would provide the cause of action sought by Respondents, and implied by the 9th Circuit.

This fact lends further support to view taken by the 8th Circuit in Furrer; and clearly demonstrates that the opinion below must be reversed.

III. NOTHING IN THE LEGISLATIVE HISTORY SUPPORTS THE CREATION OF THIS IMPLIED CAUSE OF ACTION

RCRA has contained a citizen suit provision dating back to its original enactment in 1976.

According to the discussion of the original citizens suit provision found in Senate Report 94-988, 94th Cong. Second Session @ p.18:

" The Committee drew on the similar provisions of the Clean Air Act of 1970 and the Federal Water Pollution Control Act Amendments of 1972.

The bill provides for citizen participation in the enforcement of requirements and regulations established under this Act.

This provision is carefully restricted to actions where violations of standards or regulations or a failure on the part of officials to perform mandated action is alleged.

Time is provided between notice and filing of the action to give the State or the Administrator an opportunity to act on the alleged violation."

We believe two points are critical here.

First, from its inception, the RCRA citizen suit provision has been "carefully restricted".

Those "careful restrictions" have never been removed by Congress, despite efforts to do so.

Even a cursory review of the Conference Report to the 1984 Amendments reveals that :

" **The Senate Amendment contains a similar provision, <u>limiting</u> citizens' right of action ...**
<u>CONFERENCE SUBSTITUTE.-</u> The Conference Substitute adopts the Senate Amendment with <u>additional</u> limitations on citizens' right of action ..."
House Report # 98-1133 (98th Cong. 2d Session, 1984).

If Congress has removed these " careful restrictions " and " additional limitations ", then the source of that removal is absent from the legislative history.

Given the detailed list of restrictions spelled out in the Conference Report, (and the statute

itself), it stands to reason that such restrictions would appear in the important areas of what costs are recoverable, and the statute of limitations.

The 9th Circuit opinion gives us no guidance as to what costs would be recoverable, rather it would require an ad hoc determination of whether the costs incurred are, or were, "necessary action".

By contrast, under CERCLA, where the right to seek reimbursement for clean up costs incurred, is expressly provided for in the statute, the only costs recoverable are those that are **"consistent with the National Contingency Plan"** . 42 U.S.C. 9607(a).

A second area where the 9th Circuit would throw "careful

restrictions" out the window is with respect to the statute of limitations.

CERCLA provides a remarkably detailed statute of limitations for cost recovery actions.

RCRA's silence on this point, both in the statute, as well as in the legislative history, is deafening.

If Congress' intended to create a private damage action under "carefully restricted" citizen suit provision under RCRA, it would have spelled out, as it did in CERCLA, what costs are recoverable, and when an action to recover such costs must be filed.

At a minimum, we should be able to find legislative history that clearly articulates and affirmatively expresses what costs are recoverable,

what standard is used in conducting judicial review of such cost recovery actions; and what statute of limitations is to be applied.

Such history is conspicuous by its absence, thus it is entirely inappropriate to "unlimit" the carefully restricted RCRA citizen suit provision.

The second point made clear by the legislative history is that the result in this case is virtually dictated by the decision in Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 17 (1981).

As discussed, supra, the history makes clear that the RCRA citizen suit provision is based upon the comparable

provisions of the Clean Air Act.

In Sea Clammers, 453 U.S. 1, (1981), the Court noted that the Clean Air Act of 1970 " **makes no provision for damages to the individual**" 453 U.S. at 17, citing 116 Cong. Record 33104 (19700 (Statement of Senator Hart).

It should be noted that the legislative history does reveal an effort in the House to undercut the holding of Sea Clammers and also that of Milwaukee v. Illinois (II), 451 U.S. 304 (1981), with respect to the issue of whether the issue of whether actions may be brought under RCRA pursuant to supplementary authority to the express language of the statute inferred by "federal common law".

See, House Report 98-198, Part 3, at p.20 (Judiciary Committee).

The provision was dropped in Conference, as evidenced by the following:

" I note with satisfaction the decision of the Conference Committee to reject the House Amendment entitled " Preservation of Other Rights " ;

This innocuous sounding amendment was intended to convey the message to the federal judiciary that there is a " federal common law " applicable to hazardous waste.

As a result of the decisions in the City of Milwaukee and National Sea Clammers cases, it is clear beyond dispute that there cannot be any "federal common law" in an area covered by a comprehensive Federal statute such as the Solid Waste Disposal Act.....

The ironic thing is that there is hardly any area in which the ad hoc creation of remedies by individual judges is less necessary."
(Cong. Rec. Oct. 5, 1984 pp. S13812, 13813; (remarks of Sen. Simpson).

Whether it is viewed as an implied cause of action, or an attempt

to revive the notion that " federal common law " can create causes of action, the fact is that Congress affirmatively rejected attempts on several fronts to create the cause of action conjured up by the 9th Circuit majority.

The legislative history does not clearly articulate and affirmatively express an unmistakable implication that Congress intended to create the cause of action relied upon, therefore we believe no further inquiry should be required.

Congress rejected numerous efforts to create the federal private cause of action damage, such as by repealing the petroleum exclusion to CERCLA.

The ruling sought by the Respondents would have the same practical effect, and revolutionize the rules of the game that those of us who making our living in the petroleum marketing industry have lived with for over a decade.

In conclusion, the legislative history is utterly devoid of the a clearly articulated and affirmatively expressed intent to create the cause of action sought by petitioners, therefore the opinion below must be reversed.

IV. IF SUCH A CAUSE OF ACTION EXISTS IT IS LIMITED TO IMMINENT AND SUBSTANTIAL ENDANGERMENTS

The plain language of the citizen suit provision allows a person to bring an action:

" on his own behalf against any past

or present generator, transporter or past or present operator of a treatment, storage or disposal facility who has contributed or is contributing to the past or present to the past or present handling, storage, treatment or disposal of any solid or hazardous waste <u>which may present an imminent and substantial endangerment to health or the environment...</u>

The key is the term " imminent". There is simply no imminent endangerment where the site has question had been cleaned up three years prior to the action being brought.

Thus, even if a cause of action for damages can be implied, it cannot be applied under the facts of this case.

The endangerment in this case is neither "imminent" nor is it ongoing, rather damages are sought for actions of the past.

Application of the principles enunciated in Gwaltney of Smithfield v. Chesapeake Bay Foundation, 484 U.S. 49 (1987), where this Court held that under the Federal Water Pollution Act, no action should lie where a citizens suit is based upon violations that occurred entirely in the past, shows that no cause of action should lie in the case at bar.

CONCLUSION

Congress never intended to create a private right of action for damages under RCRA generally, or under the underground tank program created by Subtitle I of RCRA specifically.

The practical effect of the 9th Circuit's ruling is enormous. Congress was aware of those effects and thus

did not provide the cause of action implied by the 9th Circuit.

The opinion under review amounts to judicial repeal of a carefully crafted legislative framework that has worked well.

SCSSA therefore must urge the Court to reverse the decision of the 9th Circuit.

Respectfully submitted,

Dimitri G. Daskalopoulos
3 Church Circle
Suite 500
Annapolis, Md. 21401
(301) 261-8880

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November, 1995, I served, via facsimile, and by air courier copies of this Motion for Leave to File and Brief Amicus Curiae in Support of Petitioners upon:

John P. Zaimes
444 So. Flower St.
Los Angeles, Cal. 900710
Counsel for Petitioners

and to

Dan Romano
100 Wilshire Bldg.
Suite 1300
Santa Monica, Cal. 90401
Counsel for Respondent

Dimitri G. Daskalopoulos

Dimitri G. Daskalopoulos

Supreme Court, U.S.
FILED
NOV 9 1995
CLERK

No. 95-83

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ALAN MEGHRIG and MARGARET MEGHRIG,
Petitioners,

v.

KFC WESTERN, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF *AMICUS CURIAE* OF THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA

ALPHONSE M. ALFANO
(Counsel of Record)
ROBERT S. BASSMAN
BASSMAN, MITCHELL & ALFANO, CHTD.
1201 New York Avenue, N.W.
Washington, D.C. 20005
202-466-6502

Counsel for Amicus Curiae

Of Counsel
John J. Huber, Counsel
Petroleum Marketers Association of America

CASILLAS PRESS, INC. WASHINGTON, D.C. 202-223-1220

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 2

ARGUMENT 3

A. The Ninth Circuit Erred in Failing to Apply the Precedents of this Court that Establish Standards for Implied Rights of Action 5

1. The Court Below Did not Fashion a Restitutionary Remedy; it Authorized a Private Right of Action for Money Damages . 7

2. The Citizen Suit Provision of RCRA Was not Intended by Congress as a Private Right of Action for Damages 9

B. The Ninth Circuit's Decision in this Case Establishes a Dangerous Precedent; it Authorizes Courts to Vindicate Their Value Preferences through Judicial Legislation 14

TABLE OF AUTHORITIES

Cases:

Boris v. Hill, 375 S.E.2d 716 (Va. 1989) 11

California v. Sierra Club,
451 U.S. 287 (1981) (White, J.) 5

Cannon v. University of Chicago,
441 U.S. 677 (1979) 12, 14

Director, UWCP v. Perini North
River Assoc., 459 U.S. 297 (1983) 12

Feldman v. Rucker, 109 S.E.2d 379 (Va. 1959) . . . 11

Furrer v. Brown, 62 F.3d 1092 (8th Cir. 1995) . 6, 13

Hydro-Manufacturing, Inc. v. Kayser-
Roth Corp., 640 A.2d 950 (R.I. 1994) 8, 11

KFC v. Meghrig, 49 F.3d 518, 519
(9th Cir. 1995) 3, 6, 9, 11, 14

Philadelphia Electric Co. v. Hercules, Inc.,
762 F.2d 303 (3rd Cir. 1985),
cert. denied, 474 U.S. 980 (1985) 11

Porter v. Warner Holding Co., 328 U.S. 395 (1946) . 7

Smith Land & Improvement Corp. v.
Rapid-American Corp.,
18 Envtl. L. Rep. 20, 769 (M.D. Pa. 1987) 11

Touche Ross & Co. v. Reddington,
422 U.S. 560 (1979) 5, 14

TransAmerica Mortgage Advisors, Inc. v.
Lewis, 444 U.S. 11 (1979) 5

Westwood Pharmaceuticals, Inc. v.
National Fuel Gas Distribution Corp.,
37 F. Supp. 1272 (W.D.N.Y. 1990),
aff'd, 964 F.2d 857 (2d Cir. 1992) 11

Wilson Auto Enterprises, Inc. v. Mobil Oil
Corp., 778 F. Supp. 101 (D.R.I. 1991) 8, 11

Statutes:

Comprehensive Environmental Response,
Compensation, and Liability Act
(CERCLA) 42 U.S.C. §§ 9601-9675 13

Resource Conservation and Recovery Act
(RCRA), 42 U.S.C. § 6972, *et seq.* 4, 9, 10

Other Authorities:

Friedman, *Contracts and Conveyances*
of Real Property (4th ed. 1984) § 1.2(n) 11

H.R. Rep. No. 98-198, 98th Cong.,
2d Sess., at 48 (1984), *reprinted in*
1984 U.S.C.C.A.N. 5576 . . . . . 6, 10, 13

Douglas Laycock, *Modern American Remedies*,
Little, Brown & Co. (1985) 7

John F. O'Connell, *Remedies*, West (1985) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ALAN MEGHRIG and MARGARET MEGHRIG,
Petitioners,

v.

KFC WESTERN, INC.,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

BRIEF *AMICUS CURIAE* OF THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA

The Petroleum Marketers Association of America (PMAA) respectfully submits this brief *amicus curiae* in support of Alan and Margaret Meghrig in this case. Written consent to the filing of this brief has been obtained from all parties. The original letters authorizing consent have been filed concurrently herewith.

INTEREST OF *AMICUS CURIAE*

The PMAA is a federation of 42 state and regional trade associations representing more than ten thousand small business petroleum marketers.[1/] Together, PMAA members market approximately 46 percent of the gasoline and 75 percent of the home heating oil sold in America. In addition, they supply more than one-half of the Nation's retail motor fuel facilities,[2/] approximately three-quarters of which are operated by independent retailers. PMAA members are primarily composed of jobbers and other wholesale distributors of refined petroleum products, as well as chain retailers that market motor fuels through service station outlets.

In connection with their businesses, PMAA members have purchased and sold tens of thousands of parcels of real property at which petroleum products were stored, distributed, or sold. Because they served as both the vendor and vendee of petroleum-contaminated properties, petroleum marketers have a unique perspective as to the understandings that animated these transactions and the balance of interests that is reflected in the parties' determinations of fair market value. They also have a great deal at stake. At issue is a decision of the Ninth

---

[1/] A list of the constituent state and regional trade associations that compose the PMAA is set forth in the Appendix hereto.

[2/] Independent marketers own or lease more than 50,000 retail facilities nationwide and store fuel at more than 10,000 additional "bulk plants." PMAA's 1994 member survey discloses that its members supplied 71,279 of America's approximately 150,000 retail motor fuel distribution outlets (*e.g.*, gasoline stations, truck stops, convenience stores). Their 240,000 full-time employees service this network with roughly 100,000 vehicles.

Circuit Court of Appeals[3/] that exposes petroleum marketers to unlimited liability for the costs of remediating petroleum contamination at properties in which they had an ownership interest at one time or another over a period of decades.

Although PMAA members stand to benefit from the decision below, to the extent they were vendees of petroleum-contaminated property, or to be affected adversely by the decision, to the extent they were vendors, their collective interest is aligned with that of the Meghrigs. For the reasons that follow, the Ninth Circuit's decision in this case, if allowed to stand, would serve to retroactively reallocate the rights and obligations of parties to settled real estate transactions. It would place a cloud over the transactions and jeopardize the viability of many petroleum marketers who may now be called upon to suffer the costs of remediating sites they parted with years ago. The uncertainties created by these contingent liabilities would stifle the business plans of all but the most ambitious marketer; it would unsettle real estate markets for petroleum-related properties, and it would lead to dislocations in an industry in which market stability and predictability are essential to plans for growth.

ARGUMENT

Over the decades, petroleum marketers purchased and sold tens of thousands of properties at which petroleum storage, distribution, or dispensing operations were conducted. An important component in establishing the fair market value of these properties was a set of common understandings as to the risk of exposure of the vendor and vendee to claims arising out of petroleum contamination. These understandings were grounded in

---

[3/] The opinion of the Court of Appeals is reported at 49 F.3d 518 (9th Cir. 1995).

certain well-defined rules regarding the liability of property owners to state regulatory agencies, to adjacent property owners, and to successor land owners. The rules emanate from the common law and from the various state statutes that govern petroleum leaks and spills.

The understandings of the vendor and vendee as to the risks and liabilities of property ownership were reflected in the purchase price for the property. Properties sold "as is" or in their "present condition" were conveyed without any warranty as to condition, thus reflecting the intent of the vendor and vendee to allocate the risks of property ownership in the context of determining fair market value. If a vendor sold a contaminated property at an appropriately discounted price, the rules governing real property transactions, including the doctrine of *caveat emptor*, precluded any unbargained-for liability to remote vendees. In this way, the market allocated resources and risks in an orderly climate of well-defined rights and responsibilities.

The decision of the Ninth Circuit in this case imputes to Congress an intent to retroactively reallocate the rights and obligations of parties to real property transactions without regard to the understandings on which the transactions were based. By interpreting the citizen suit provision of the Resource Conservation and Recovery Act (RCRA)[4/] to authorize a private right of action for money damages, albeit in the form of "equitable restitution," the court created a remedy so broad in scope as to effectively preempt the more limited state remedies and defenses which had heretofore governed the parties' actions. The ultimate consequence of the ruling is enormous. It calls into question the understandings on which thousands of bargained-for transactions were grounded and subjects them to scrutiny on the basis of rules that were never imagined when the parties set out to define their respective obligations.

[4/] 42 U.S.C. § 6972(a)(1)(B).

The decision of the Ninth Circuit rests on the notion that Congress intended these consequences notwithstanding the absence of any explicit reference in RCRA's citizen suit provision to a private right of action for money damages. It construed the language "to take such other action as may be necessary" to include the full range of equitable remedies, including "restitution," to be targeted, in the absence of a statute of limitations, to each vendor in the chain of title.

For the reasons that follow, the presumption that Congress had the will to effect such enormous change cannot be based on so little in the way of evidence of congressional intent. Indeed, it is clear that the decision of the court below rested not on evidence of congressional intent, but on a conclusion that "public policy concerns" favor a restitutionary remedy. It is not the role of the federal courts, however, to "engraft a remedy on a statute, no matter how salutary, that Congress did not provide." *California v. Sierra Club*, 451 U.S. 287, 298 (1981) (White, J.).

A. The Ninth Circuit Erred in Failing to Apply the Precedents of this Court that Establish Standards for Implied Rights of Action

In *Cort v. Ash*, 422 U.S. 66 (1975), this Court set out four standards for determining whether a private right of action exists in a statute. They are: (i) whether the plaintiff is in the class for whose benefit the statute was enacted, (ii) whether the legislative history evidences an intent to create a cause of action, (iii) whether the proposed remedy is consistent with the statutory scheme, and (iv) whether the cause of action is one traditionally a matter of state law. In later decisions, the Court restructured the inquiry, stating that congressional intent is the determinative factor, and that the other three are indicative of its presence or absence. *Touche Ross & Co. v. Reddington*, 422 U.S. 560, 575-576 (1979); *TransAmerica Mortgage Advisors,*

Inc. v. Lewis, 444 U.S. 11, 18 (1979). The central focus of the inquiry, therefore, is whether Congress intended to create a remedy.

The focus of the decision below is not on congressional intent. On the contrary, it assumes that congressional intent is evident in an explicit authorization for courts "to take such other action as may be necessary," which the court construed as including equitable remedies such as restitution. In effect, the Ninth Circuit concluded that it was not recognizing an implied right of action; rather, it was giving effect to an express right of action for restitutionary relief.[5/]

In order to accomplish this result, the court indulged in two assumptions, neither of which was subjected to even a cursory analysis. First, the court agreed with KFC that "its damages claim was actually a claim for 'equitable restitution.'" *KFC v. Meghrig*, 49 F.3d 518, 519 (9th Cir. 1995). Second, it concluded that an equitable remedy, such as restitution, is merely an adjunct to the type of injunctive relief that is indisputably authorized by the statute and encompassed in the language "such other action as may be necessary . . . ." This assumption was necessary to conform the remedy to what Congress clearly intended as the "equitable authority of Section 7003." *H.R. Rep. No. 98-198*, 98th Cong., 2d Sess., 48 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5607. As will be developed more fully below, however, neither of these assumptions is valid.

[5/]The approach taken by the court below stands in stark contrast to the one applied by the Eighth Circuit Court of Appeals in *Furrer v. Brown*, 62 F.3d 1092 (8th Cir. 1995), which examined the identical issue. The Eighth Circuit applied the factors set out in *Cort v. Ash* and concluded that RCRA does not authorize a private right of action for monetary remedies.

1. The Court Below Did not Fashion a Restitutionary Remedy; it Authorized a Private Right of Action for Money Damages

Restitution is an equitable remedy that attempts to restore a plaintiff to the position it would have been in had there been no wrongful act committed by the defendant. *See, e.g., Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946). The remedy is restorative in nature; on the basis of equitable principles, it attempts to reimburse the plaintiff for what was unlawfully acquired from him. The most distinctive feature of restitution is that liability is based on, and recovery is usually measured by, benefit to the defendant rather than harm to the plaintiff.[6/] In short, restitution is based upon the gains to the defendant which would be unjust for him to retain.[7/]

The remedy imposed by the court below is more mechanical in its approach than anything that can be characterized as restitutionary. It requires any party who contributed in the past to a current endangerment to reimburse the plaintiff for the costs of cleaning up a site. Damages are measured by the amount of the plaintiff's costs of remediation; there is no attempt to determine whether the defendant was unjustly enriched or whether a reimbursement in the amount of the remediation costs would restore the *status quo ante*.

Assuming that the wrongful act of the defendant is its contribution to the endangerment, the aggregate of the plaintiff's clean-up costs may be greater than necessary to restore the plaintiff to the position it would have been in had the wrongful act not occurred. Were the property not contaminated, the plaintiff may never have been in a

---

[6/]Douglas Laycock, *Modern American Remedies*, 462.

[7/]John F. O'Connell, *Remedies*, 72.

position to purchase it. Clearly, the range of options available to a vendor of clean property is significantly greater than would be the case if the property were polluted with petroleum hydrocarbons. More than likely, the price at which the plaintiff purchased the property would have been greater in the event the property were clean at the time of sale. Assuming for the moment that the purchase price for the property was discounted by the estimated amount of clean-up costs, reimbursement in the manner prescribed by the court below would unjustly enrich the plaintiff, KFC.

Moreover, "[b]uyers of contaminated land, unlike the victims of negligent acts, are in a position to protect themselves through contract or by refusing to conclude a transaction." *Hydro-Manufacturing, Inc. v. Kayser-Roth Corp.*, 640 A.2d 950, 956 (R.I. 1994). A prospective buyer, for example, "can bargain with the seller for security or indemnity against unknown defects." *Wilson Auto Enterprises, Inc. v. Mobil Oil Corp.*, 778 F. Supp. 101, 105 (D.R.I. 1991). Even where no security is obtained by the buyer, and there is no reduction in the purchase price, the property may have a value to the buyer that is far in excess of its fair market value. Whether reimbursement is equitable, therefore, and whether the vendor has been unjustly enriched as a result of remediation by the vendee, it is subject to numerous market-based and other policy considerations, among which is whether a vendee who purchases property after a satisfactory inspection assumes all risk of liability from petroleum contamination.

The Ninth Circuit did not, however, appear concerned with the intricacies of fashioning a truly restitutionary remedy. Its conception of the remedy envisioned by Congress is one in the nature of indemnity. *See KFC*, *supra*, at 524. ("[T]he innocent private party, like KFC, who purchases already-contaminated property, often must clean the property immediately and recover secondarily from the actual polluter"). Its aim is narrow; that is, to compensate the vendee for the costs of remediation on the

assumption that a "right to reimbursement" would encourage prompt cleanups.[8/] As such, it is functionally no different from compensatory damages.

2. The Citizen Suit Provision of RCRA Was not Intended by Congress as a Private Right of Action for Damages

The RCRA citizen suit provision provides in pertinent part that:

> The district court shall have jurisdiction . . . to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in [§ 6972(a)(1)(B) (the endangerment provision)] [and] to order such person to take such other action as may be necessary, or both . . . .

42 U.S.C. § 6972(a).

In construing the "such other action as may be necessary," language to include a private right of action for damages, the court below crafted a broad-based remedy that effectively abrogates the various defenses available to the defendant under the common law. Thus, the court has created a "super remedy" that supersedes and renders meaningless the traditional common law remedies available to a vendee against the vendor of real property. Congress could not have intended to create such a remedy and, at

---

[8/] *See* 49 F.3d at 524. ("The right to reimbursement becomes important to the Administrator only when contamination requires prompt attention, which is always the case for private citizens who are ordered to remedy contamination.").

the same time, to preserve state law remedies as an adjunct to the equitable remedies available under RCRA.

In RCRA, Congress inserted a savings clause which preserves a person's rights "under any statute or common law . . . to seek any other relief." 42 U.S.C. § 6972(f). The legislative history of the 1984 amendment to § 6972 reflects the awareness of Congress that these state law claims would be instituted in conjunction with a citizen's suit under RCRA to abate an imminent hazard.[9/] In fact, the legislative history of the 1984 amendment suggests a congressional awareness that the state and federal actions would be instituted in tandem, the federal action for injunctive relief to abate the endangerment and the state causes of action to seek reimbursement for the losses associated with petroleum contamination.[10/] In any event, the congressional assumptions evident in the legislative history would make no sense if the citizen's suit provision were interpreted to include the private damage remedy envisioned by the Ninth Circuit. For the reasons set forth below, the state remedies would be useless surplusage in relation to the more potent federal cause of action.

Where, as here, a vendee sues the vendor of real property, common law defenses are often available to bar the claim. In jurisdictions that adhere to the doctrine of *caveat emptor*, a seller cannot be held responsible for defects, such as petroleum contamination, existing in the

---

[9/] *H.R. Rep. No. 98-198*, 98th Cong., 2d Sess., 48 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612.

[10/] *See id.* ("Although the Committee has not prohibited a citizen from raising claims under state law in a Section 7002 action, the Committee expects courts to exercise their discretion concerning pendent jurisdiction in a way that will not frustrate or delay the primary goal of this provision, namely the prompt abatement of imminent and substantial endangerments.").

property at the time of sale.[11/] Nor would such defects afford the purchaser a basis to resist an action for specific performance of the sales contract, *Feldman v. Rucker*, 109 S.E.2d 379 (Va. 1959) or, absent an attempt by the seller to prevent discovery of the defects, to seek recision. *Boris v. Hill*, 375 S.E.2d 716 (Va. 1989). The same result would obtain where the buyer attempts indirectly to circumvent the rule, such as by claiming that the defects were the result of the seller's negligence, *Hydro-Manufacturing*, *supra*; *Wilson Auto Enterprises*, *supra*, or where the purchaser claims that the defects have resulted in a private nuisance. *Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distribution Corp.*, 737 F. Supp. 1272, 1282 (W.D.N.Y. 1990), *aff'd*, 964 F.2d 85 (2d Cir. 1992). This is also true where the vendee of real property seeks compensation for remediation expenses from the vendor on a theory of common law indemnity. *Philadelphia Electric Co. v. Hercules, Inc.*, 762 F.2d 303, 318 (3d Cir. 1985), *cert. denied*, 474 U.S. 980 (1985) ("The same policy considerations that counsel adherence to the rule of *caveat emptor* in this situation militate against shifting the loss to Hercules on an indemnity theory."). *See also, e.g., Smith Land & Improvement Corp. v. Rapid-American Corp.*, 18 Envtl. L. Rep. 20, 769 (M.D. Pa. 1987). Common law remedies are also susceptible to being barred by the applicable statutes of limitations and repose.

The remedy envisioned by the Ninth Circuit is immune to these defenses. The court below authorized relief in the form of money damages in a suit by a vendee against the vendor of real property without regard to *caveat emptor* and any statute of limitations.[12/] *KFC*, *supra*, at 522-

---

[11/] Milton Friedman, *Contracts and Conveyances of Real Property* § 1.2(n) (4th ed. 1984) and cases cited therein.

[12/] The Ninth Circuit does not see the lack of any limitations period "as a problem." 49 F.3d at 522-523. In addressing this issue,

(continued...)

523. In short, it imputed to Congress an intent to create a super remedy that imposes strict liability on any party contributing to an endangerment, irrespective of negligence or other actionable conduct, and one that is not susceptible to the traditional common law defenses. Moreover, by characterizing the remedy as one sounding in restitution, the court below did not foreclose the possibility that restitution could go beyond compensation for clean-up costs and extend to other areas, such as lost profits or other business-related damages.

Because the remedy made available to KFC is significantly more potent than anything available at common law, or under state statutes that are subject to a statute of limitations, it is unlikely that private litigants would rely on the traditional common law remedies. It is unlikely, therefore, that Congress made a point of preserving state law only to create a remedy that effectively supersedes it.[13/]

It is even more unlikely that Congress could have intended a remedy that is such a marked departure from existing law in the absence of some explicit reference in the statute or in the legislative history. Indeed, the legislative history indicates a contrary intention. Congress could not have characterized the citizen's suit provision as

---

[12/](...continued)
it concluded that "[b]y applying equitable defenses such as *laches*, courts can alleviate any unfairness that might be created by the lack of a limitations period for RCRA citizens' suit." *Id.* In substance, the court below construed congressional intent to permit the courts unlimited discretion to determine the reach of the remedy it created on a case-by-case basis.

[13/]It is assumed, of course, "that Congress is aware of existing law when it passes legislation." *Director, UWCP v. Perini North River Assoc.*, 459 U.S. 297, 319-320 (1983); *Cannon v. University of Chicago*, 441 U.S. 677, 696-697 (1979).

conferring "a limited right . . ."[14/] to sue and, at the same time, to have envisioned a super remedy that broadens the rights of vendee-litigants beyond anything recognizable at common law.

As the Eighth Circuit concluded in *Furrer*, referring to the explicit provision contained in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[15/] Congress would have included an express provision in RCRA authorizing contribution or indemnity if such were its intent:

> Congress, knowing its CERCLA citizen's suit provision, did not extend the available remedies to include a cause of action for monetary recovery from other responsible parties, despite the broad "other action" language (which is also found in the RCRA citizen's suit provision), and wishing to allow such a remedy in certain cases, enacted § 9613(f)(1) to provide expressly for contribution.

62 F.3d at 1096-97. On the basis of the foregoing, there is no reason to believe that Congress would not have been equally as clear had it desired to create a CERCLA-type remedy in RCRA.

[14/]*H.R. Rep. No. 98-198*, 98th Cong., 2d Sess., 48 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612.

[15/]42 U.S.C. §§ 9601-9675.

B. The Ninth Circuit's Decision in this Case Establishes a Dangerous Precedent; it Authorizes Courts to Vindicate Their Value Preferences through Judicial Legislation

There can be no question that the lower court's preference for reading so much into so little was animated by a desire to further public policy as the court sees it. Thus, it fashioned a remedy aimed at encouraging the prompt remediation of contaminated sites, stating that "public policy concerns might favor allowing a plaintiff to clean contaminated property first and seek reimbursement later." *KFC*, *supra*, at 524. The court's desire to expedite the remediation of contaminated properties, however, should not have been the principal focus of its inquiry. The focus of the inquiry is on whether Congress intended to create a remedy. *Touche Ross*, 442 U.S. at 575. "When Congress chooses not to provide a civil remedy, federal courts should not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction." *Cannon*, 441 U.S. at 730-731 (Powell, J. dissenting).

While courts routinely derive implications from statutory language, the well-recognized dangers of such implications are greater when a private right of action is inferred. The ramifications of the court's decision to infer a right of action go far beyond the applicable factual record and, thus, the court's decision is far more legislative in character than one involving the interpretation of an ambiguous statutory provision. The instant case presents a classic example of the dangers inherent in such a process, dangers that stem from the court's indifference to the myriad implications of its decision. These implications, especially as they regard petroleum marketers, are far-reaching and profound.

As stated above, the decision of the court below will retroactively alter the nature of transactions involving tens of thousands of parcels of real property. With the benefit

of hindsight, it attempts to inject into these transactions contemporary notions of fairness without regard to the market factors on which the transactions were based. It exposes thousands of vendors of real property to unbargained-for liability to remote vendees many years after the sales of property were concluded, and seriously threatens the viability of many of them.

The Ninth Circuit's decision was rendered in the absence of any analysis of these implications and without regard to the efforts of Congress and the state legislatures to actively seek a socially acceptable definition of rights and liabilities in the area of environmental contamination. Congress has played its part in attempting such a balance through the enactment of comprehensive statutory schemes that explicitly define the rights and obligations of parties in the circumstances presented here. The decision below, if not reversed by this Court, will significantly alter the balance and encourage other courts to do the same.

CONCLUSION

For these reasons, the PMAA respectfully urges this Court to reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

ALPHONSE M. ALFANO

(Counsel of Record)
ROBERT S. BASSMAN
BASSMAN, MITCHELL & ALFANO, CHTD.
1201 New York Avenue, N.W.
Washington, D.C. 20005
202-466-6502

Counsel for Amicus Curiae

APPENDIX

Amicus Curiae, Petroleum Marketers Association of America, is a non-profit trade association comprising the following associations:

Arizona Petroleum Marketers Association
Arkansas Oil Marketers Association, Inc.
California Independent Oil Marketers Association
Colorado Petroleum Marketers Association
Empire State Petroleum Association
Florida Petroleum Marketers Association
Fuel Merchants Association of New Jersey
Georgia Oilmen's Association
Idaho Oil Marketers Association
Illinois Petroleum Marketers Association
Independent connecticut Petroleum Association
Independent Oil Marketers Association of New England
Indiana Oil Marketers Association, Inc.
Kansas Oil Marketers Association
Kentucky Petroleum Marketers Association
Louisiana Oil Marketers Association
Maine Oil Dealers Association
Michigan Petroleum Association
Mid-Atlantic Petroleum Distributors Association, Inc.
Minnesota Petroleum Marketers Association
Mississippi Petroleum Marketers Association
Missouri Petroleum Marketers Association
Montana Petroleum Marketers Association
Nebraska Petroleum Marketers, Inc.
Nevada Petroleum Marketers Association
New England Fuel Institute
New Mexico Petroleum Marketers Association
North Carolina Petroleum Marketers Association
Ohio Petroleum Marketers Association
Oklahoma Petroleum Marketers Association
Oregon Petroleum Marketers Association
Pennsylvania Petroleum Association, Inc.
Petroleum Marketers Association of Wisconsin, Inc.

Petroleum Marketers of Iowa
South Carolina Petroleum Marketers Association
South Dakota Petroleum Marketers Association
Tennessee Oil Marketers Association
Utah/Western Petroleum Marketers Association
Virginia Petroleum Marketers Association
Washington Oil Marketers Association
West Virginia Petroleum Marketers Association
Wyoming Petroleum Marketers Association

(9)

No. 95-83

Supreme Court, U.S.
FILED
DEC 8 1995
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1995

ALAN MEGHRIG AND MARGARET MEGHRIG,
Petitioners

vs.

KFC WESTERN, INC.,
Respondent

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

Brief of Kaufman and Broad Home Corporation and Kaufman and Broad — South Bay, Inc. As Amici Curiae Supporting Respondent

WILLIAM N. KAMMER
Counsel of Record
J. MARTIN ROBERTSON
ROBERT C. LONGSTRETH
LARRY J. BRADFISH

GRAY CARY WARE & FREIDENRICH
A Professional Corporation
401 B Street
Suite 1700
San Diego, California 92101
(619) 699-2711

400 Hamilton Avenue
Palo Alto, California 94301
(415) 328-6561

Counsel for Kaufman and Broad Home Corporation and Kaufman and Broad — South Bay, Inc.

BEST AVAILABLE COPY

25 pp

QUESTION PRESENTED

Whether Section 7002(a)(1)(B) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(B), authorizes a private party to seek restitution of its costs of cleaning up solid or hazardous wastes which may present an imminent and substantial endangerment to health or the environment?

TABLE OF CONTENTS

Page

STATEMENT OF INTEREST OF *AMICI CURIAE* . . 1
SUMMARY OF ARGUMENT 3
ARGUMENT 5

I

The Ninth Circuit Correctly Determined That The RCRA Citizen Suit Provision Authorizes Private Parties To Seek Restitution Of Their Cleanup Costs 5

A. The Broad Grant Of Authority In RCRA Section 7002(a)(1)(B) Allows The Court To Order A Party To Make Restitution 5

B. The Petitioners Inappropriately Apply The Analysis Under *Cort v. Ash* To Determine The Extent Of Relief Available Under RCRA Section 7002(a) . . . 13

II

The Ninth Circuit Correctly Determined That Restitutionary Relief Is Available To Private Parties Where Private Parties Responded To Conditions Which May Present An Endangerment Before Filing Suit . . . 15

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Page

Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981) 14, 15
Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761 (7th Cir. 1994) 10
Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149 (9th Cir. 1989) 13
Bayless Investment & Trading Co. v. Chevron U.S.A., Inc., 39 Envtl. Rep. Cas. 1428 (D. Ariz. 1994) 13
Brown v. Swann, 35 U.S. 497 (1836) 7
California v. America Stores Co., 495 U.S. 271 (1990) 7, 9
Cort v. Ash, 422 U.S. 66 (1975) 13, 14, 15
Crawford v. University of North Carolina, 440 F. Supp. 1047 (M.D.N.C. 1977) 9
Davis v. Passman, 442 U.S. 228 (1979) 14
Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992) 14
Furrer v. Brown, 62 F.3d 1092 (8th Cir. 1995) 14
Gwaltney v. Chesapeake Bay Found., 484 U.S. 49 (1987) 15, 16
Hatco Corp. v. W.R. Grace & Co. — Conn. 859 F.Supp. 769 (D.N.J. 1994) 10
Hecht Co. v. Bowles, 321 U.S. 321 (1944) 7
Kaufman and Broad — South Bay, Inc. v. Unisys Corporation et al., No. C-92-20677 . . . . . 2, 3
Kaufman & Broad — South Bay, Inc. v. Unisys Corp., 868 F.Supp. 1212 (N.D. 1993) 2, 11
Key Tronic v. United States, __ U.S. __, 114 S.Ct. 1960 (1994) 11

TABLE OF AUTHORITIES

CASES

	Page
KFC Western, Inc. v. Meghrig, 49 F.3d 518 (9th Cir. 1995)	2, 3, 16
Lieberman v. Univ. of Chicago, 660 F.2d 1185 (7th Cir. 1981)	14
Lincoln Properties, Ltd. v. Higgins, 23 Envtl. L. Rep. 20665 (E.D. Cal. 1993)	12, 13
Lincoln Properties v. Higgins, 24 Envtl. L. Rep. 21068 (E.D. Cal. 1993)	9
Middlesex County Bd. of Chosen Freeholders v. New Jersey, 645 F.Supp. 715 (D.N.J. 1986)	13
Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981)	16
Miener v. Missouri, 673 F.2d 969 (8th Cir. 1982)	14
NL Indus. v. Kaplan, 792 F.2d 896 (9th Cir. 1986)	12
Porter v. Warner Holding Co., 328 U.S. 395 (1946)	7, 9
Thaler v. PRB Metal Products, Inc., 810 F.Supp. 49 (E.D.N.Y. 1993)	10
United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373 (8th Cir. 1989)	8, 16
United States v. Colorado & E.R.R., 50 F.3d 1530 (10th Cir. 1995)	10
United States v. Long, 537 F.2d 1151 (4th Cir. 1975) cert. denied, 429 U.S. 871 (1976)	9
United States v. Mottolo, 605 F.Supp. 898 (D.N.H. 1994)	10
United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726 (8th Cir. 1986)	10
United States v. Price, 688 F.2d 204 (3d Cir. 1982)	8, 9
United Technologies v. Browning-Ferris Indus., Inc., 33 F.3d 96, cert. denied, ____ U.S. ____, 115 S.Ct. 1176 (1995)	10

TABLE OF AUTHORITIES

CASES

	Page
Wickland Oil Terminals v. ASARCO, Inc., 792 F.2d 887 (9th Cir. 1986)	12

Statutes, Regulations and Rules

Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.*:	
§ 101(27), 42 U.S.C. § 9601(27)	11
§ 106(a), 42 U.S.C. § 9606(a)	7
§ 107, 42 U.S.C. § 9607	11
§ 107(a), 42 U.S.C. § 9607(a)	10, 11
§ 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B)	11
§ 113(f)(1), 42 U.S.C. § 9613(f)(1)	11
Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*	
§ 1004(5), 42 U.S.C. § 6903(5)	11
§ 1004(27), 42 U.S.C. § 6903(27)	11
§ 7002(a), 42 U.S.C. § 6972(a)	*passim*
§ 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B)	*passim*
§ 7002(a)(2), 42 U.S.C. § 6972(a)(2)	14
§ 7002(e), 42 U.S.C. § 6972(e)	12
§ 7003, 42 U.S.C. § 6973	4, 6, 7, 8
40 C.F.R. § 300.700(c)(3)(i)	12
55 Fed. Reg. 8666 (March 8, 1990)	12
Supreme Court Rule 37.3	1

TABLE OF AUTHORITIES

CASES

	Page
Miscellaneous	
Pub. L. 89-272, Title II, § 1001, as amended by Pub. L. 89-272, 90 Stat. 2795 (1976)	5
Pub. L. 94-580, 90 Stat. 2801 (1976)	5
H.R. Rep. No. 198, 98th Cong., 2d Sess. pt. 1, at 53 (1984)	5, 7
S. Rep. No. 284, 98th Cong., 1st Sess. (1983)	8
Adam Babich, *RCRA Imminent Hazard Authority: A Powerful Tool for Businesses, Governments, and Citizen Enforcers,* 29 Envtl. L. Rep. 10122 (March 1994)	11
J. Martin Robertson, *Restitution Under RCRA §7002(a)(1)(B): The Courts Finally Grant What Congress Authorized,* 25 Envtl. L. Rep. 10491 (September 1995)	6
J. Martin Robertson, *The 'Lincoln Properties' Case: Shifting The Burden of Response,* 8 Tox. L. Rep. 1395 (May 11, 1994)	8, 11

No. 95-83

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

ALAN MEGHRIG AND MARGARET MEGHRIG,
Petitioners

v.

KFC WESTERN, INC.
Respondent

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

Brief of Kaufman and Broad Home Corporation and Kaufman and Broad — South Bay, Inc. As Amici Curiae Supporting Respondent

Kaufman and Broad Home Corporation and Kaufman and Broad — South Bay, Inc. (collectively "Kaufman and Broad") respectfully submit this amici curiae brief in support of the Respondent, KFC Western, Inc. Kaufman and Broad have obtained the written consent of the parties as required by Rule 37.3 of the rules of this Court.

STATEMENT OF INTEREST OF AMICI CURIAE

Kaufman and Broad — South Bay, Inc. is a real estate development company that developed for residential use approximately one hundred acres of real property in

Milpitas, California. After discovering that hundreds of barrels of toxic waste had been dumped and buried on the property years before by others, Kaufman and Broad — South Bay spent over $26 million to remedy the dangerous conditions at the site. Kaufman and Broad — South Bay, Inc. is a wholly owned subsidiary of Kaufman and Broad Home Corporation. Subsidiaries of Kaufman and Broad Home Corporation develop homes throughout the State of California. In October, 1992, Kaufman and Broad — South Bay filed an action in the United States District Court for the Northern District of California, captioned *Kaufman and Broad — South Bay, Inc. v. Unisys Corporation, et al.*, No. C-92-20677 EFL, which remains pending in that court. On May 7, 1993, in an order published at 822 F. Supp. 1468 (N.D. Cal. 1993), the district court dismissed that portion of Kaufman and Broad — South Bay, Inc.'s complaint that seeks restitution of response costs under Section 7002(a)(1)(B) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a)(1)(B).

Petitioners here seek the reversal of a decision of the United States Court of Appeals for the Ninth Circuit that expressly "disapprove[s] of the reasoning used by district courts that have dismissed complaints brought under section 6972(a)(1)(B) [of RCRA] to the extent the plaintiffs sought reimbursement of clean-up costs." *KFC Western, Inc. v. Meghrig*, 49 F.3d 518, 523 (9th Cir. 1995). In the ruling challenged here, the Ninth Circuit specifically identifies the district court order dismissing Kaufman and Broad — South Bay's claim for restitution of response costs as one of the two decisions it criticized. Accordingly, the Ninth Circuit's decision, which is binding on the United States District Court for the Northern District of California, makes it clear that the order dismissing Kaufman and Broad — South Bay, Inc.'s claim for equitable restitution of its response costs cannot stand.

On July, 25, 1995, Kaufman and Broad — South Bay, Inc. moved the district court to reinstate its claim for restitution of response costs under section 7002(a)(1)(B) of RCRA in light of the Ninth Circuit's decision.[1] On September 11, 1995, the District Court granted Kaufman and Broad — South Bay, Inc.'s motion.[2] If the Ninth Circuit's decision is reversed in this case, Kaufman and Broad — South Bay, Inc. will lose an important means of recovering from the responsible parties the millions of dollars it has spent to remedy dangerous environmental contamination that it did not create.

SUMMARY OF ARGUMENT

This case involves the construction of the citizen suit provision set forth in Section 7002(a)(1)(B) of RCRA, 42 U.S.C. § 6972(a)(1)(B). The Ninth Circuit, in determining what it described as "a question of first impression," ruled that "the RCRA citizen suit provision authorizes a private plaintiff to collect restitution of clean-up costs." *KFC Western, Inc. v. Meghrig*, 49 F.3d 518, 520 (9th Cir. 1995).

The Ninth circuit's decision is correct for three reasons. First, the broad language in Section 7002(a)(1)(B) of RCRA authorizes district courts "to take such other action as may be necessary" in cases in which private party plaintiffs establish the liability of other parties for conditions that may present an endangerment to the environment or

---

[1] *See Kaufman and Broad — South Bay, Inc. v. Unisys Corporation, et al.*, No. C-92-20677 EFL, Plaintiff's Motion By Way of Reconsideration Or, In the Alternative, A Motion for Leave to Amend Its Complaint to Reinstate Claim for Restitution Against Unisys Corporation and In Support of Plaintiff's Motion to Add Claim for Restitution Against Trucking Companies (N.D. Cal. July 25, 1995).

[2] *See Kaufman and Broad — South Bay, Inc. v. Unisys Corporation, et al.*, No. C-92-20677 EFL, Order Granting Leave to File Third Amended Complaint (N.D. Cal. September 11, 1995).

health. 42 U.S.C. § 6972(a)(1)(B). Nothing in Section 7002(a)'s broad grant of jurisdiction restricts the district courts' jurisdiction — by words or inference — to granting injunctive relief, as petitioners suggest. The legislative history behind Section 7002(a)(1)(B) makes clear that Congress intended that Section 7002(a)(1)(B) confer the same rights on private parties that Section 7003 confers on the government, and that Section 7003 provides the government with a restitutionary remedy. Second, the private party in this case (like many other private parties in other cases) does not have adequate remedies under federal or state law against the polluters of contaminated property. And, third, it is important, for public policy reasons, to promote the cleanup of contamination by private parties who, without such incentive, might not engage in cleanup. A restitutionary remedy under RCRA Section 7002(a)(1)(B) promotes such cleanup.

As the federal appellate authority supporting the decision below attests, the Ninth Circuit's determination is clearly correct. The RCRA citizen suit provision is expressly directed to past conduct and expressly permits a court to order a party responsible for endangering health or the environment "to take such other action as may be necessary." 42 U.S.C. § 6972(a). This statutory language provides clear authority for a court to order a responsible party to make equitable restitution to those who have addressed and alleviated the dangerous condition. Contrary to petitioners' arguments, the Ninth Circuit has not created a new right of action by implication; it has simply recognized that the right of action already provided by Congress permits an order of equitable restitution.

ARGUMENT

I

The Ninth Circuit Correctly Determined That The RCRA Citizen Suit Provision Authorizes Private Parties To Seek Restitution Of Their Cleanup Costs.

A. The Broad Grant Of Authority In RCRA Section 7002(a)(1)(B) Allows The Court To Order A Party To Make Restitution.

Section 7002(a) of the Resource Conservation and Recovery Act ("RCRA")[3] authorizes any person to seek, on his or her own behalf, necessary relief against "any [other] person . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a).

In 1984, Congress amended Section 7002 of RCRA to allow private parties to sue responsible parties over situations in which solid or hazardous wastes may present an imminent and substantial endangerment to the environment or health. H.R.Rep. No. 189, 98th Cong., 2d Sess., pt. 1 (1984). Congress also added language authorizing district

[3] At the same time that Congress enacted RCRA, it enacted the Solid Waste Disposal Act. From the legislative history, it is unclear which act Congress enacted first. Section 1001 of Public Law 89-272, Title II, as amended by Public Law 89-272, October 21, 1976, 90 Stat. 2795, provides in part that Title II of Public Law 89-272 may be cited as the "Solid Waste Disposal Act." Section 1 of Public Law 94-580 provides that "This Act may be cited as the Resource Conservation and Recovery Act of 1976." The two acts are generally cited as the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976. But the two acts are sometimes cited as the Resource Conservation and Recovery Act, as amended by the Solid Waste Disposal Act.

courts "to take such other action as may be necessary" when private party plaintiffs establish the liability of other parties. *Id.* Section 7002(a) of RCRA contains the same language concerning the scope of equitable relief available to a private party as RCRA Section 7003, which authorizes the government to bring an action against responsible parties. 42 U.S.C. § 6972(a); 42 U.S.C. § 6973.

The court of appeals held that a private party plaintiff is entitled to restitution of its cleanup costs under Section 7002(a)(1)(B) of RCRA. The court squarely grounded its decision on the broad language in Section 7002(a)(1)(B) which authorizes district courts "to take such action as may be necessary" in cases in which private party plaintiffs establish the liability of other parties. By adding this language to Section 7002(a), Congress unquestionably intended the courts to have the same equitable authority in actions private parties bring under Section 7002(a)(1)(B) of RCRA that the courts have in actions the government brings under Section 7003 of RCRA. This broad equitable jurisdiction includes the authority to grant restitution as well as injunctive relief to private parties faced with contamination that may present an endangerment to the environment or human health.[4]

Unless specifically limited, Congress' grant of equitable jurisdiction to the courts is not restricted. The Court's equitable powers are presumed to include all of the traditional equitable powers that the courts have historically exercised. As this Court has stated:

> Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction."

Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) (quoting *Brown v. Swann*, 35 U.S. 497 (1836)). *Accord California v. American Stores Co.*, 495 U.S. 271, 295 (1990); *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944).

Nothing in Section 7002(a)'s broad grant of jurisdiction restricts the district courts' jurisdiction — by words or inference — to granting injunctive relief, as petitioners suggest. Had Congress intended to impose such a limitation, it would have been a simple matter to draft the statute so that courts would be limited to ordering only "relief as may be necessary to abate such danger or threat," instead of broadly providing that courts may order responsible parties to take any necessary action. *Cf.* Section 106(a) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), which authorizes the President to require the Attorney General "to secure such relief as may be necessary to abate such danger or threat." 42 U.S.C. §9606(a).

The legislative history behind Section 7002(a)(1)(B) makes clear that Congress intended that Section 7002(a)(1)(B) confer the same rights on private parties that Section 7003 confers on the government. The House of Representatives stated that Section 7002(a)(1)(B) confers on private parties the right to bring actions "pursuant to the standards of liability established under Section 7003." H.R. Rep. No. 198, 98th Cong.,

---

[4]Congress' broad grant of equitable jurisdiction under RCRA Section 7002(a)(1)(B) is discussed in detail in a recent article. See J. Martin Robertson, *Restitution Under RCRA § 7002(a)(1)(B): The Courts Finally Grant What Congress Authorized*, 25 Envtl.L.Rep. 10491 (September 1995).

2d Sess. pt. 1, at 53 (1984), reprinted in U.S.C.C.A.N. 5576, 5612. Similarly, the Senate stated that:

> These amendments [adding Section 7002(a)(1)(B)] are intended to allow citizens the same broad substantive and procedural claim for relief which is already available to the United States under Section 7003. Any differences in language between these amendments and 7003 are not intended to reflect a difference in such claims, but merely clarify that citizens have the same claim presently available to the United States.

S.Rep. No. 284, 98th Cong., 1st Sess., at 56-57 (1983).[5] Because Congress intended that citizen suits brought under Section 7002(a)(1)(B) confer the same rights as governmental actions brought under Section 7003, the relief available under the two provisions should be interpreted similarly. The court of appeals followed the interpretations of the language in Section 7003 by the Eighth Circuit Court of Appeals in *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373 (8th Cir. 1989) and the Third Circuit Court of Appeals in *United States v. Price*, 688 F.2d 204 (3d Cir. 1982) in its decision. This Court should, too.

Because neither Section 7003 nor Section 7002(a)(1)(B) restricts Congress' grant of equitable jurisdiction in any way, the Eighth Circuit's interpretation of Section 7003 in *Aceto* and the Ninth Circuit's interpretation of Section 7002(a)(1)(B) in this case are correct. Both sections authorize a restitutionary remedy: Section 7003 authorizes a restitutionary remedy for EPA and Section 7002(a)(1)(B) authorizes a restitutionary remedy for

---

[5] *See* J. Martin Robertson, *The 'Lincoln Properties' Case: Shifting the Burden of Response*, 8 Tox.L.Rep. 1395, 1403-04 (May 11, 1994), for further discussion of this.

private parties.[6] Thus, restitution of reasonable cleanup costs should be available to private parties under Section 7002(a)(1)(B).

Petitioners contend that reimbursement of private parties for their costs of cleaning up contamination must be characterized as damages. That is not so. Reimbursement of the costs a private party expends to clean up contamination simply restores the party to the position it occupied before conducting the cleanup. The remedy by which the courts restore a party to its pre-cleanup position is restitution, not damages. The Fourth Circuit distinguished restitution from damages by stating that:

> "[a] person obtains restitution when he is restored to the position he formerly occupied either by the return of something which he formerly had or by the receipt of its equivalent in money." . . . Damages, on the other hand, are determined by reference to the loss sustained by a victim as a result of wrongful conduct on the part of another.

United States v. Long, 537 F.2d 1151, 1153-54 (4th Cir. 1975) (quoting Restatement of Restitution, § 1 Comment: a, at 12 (1937)), cert. denied, 429 U.S. 871 (1976).[7]

---

[6] In the court of appeals' opinion, the dissent stated that "the language, 'such other action as may be necessary,' does not contemplate actions for reimbursement." 49 F.3d 518, 525 (Brunetti, J., dissenting). In so stating, however, the dissent ignored the general rule that the full scope of a court's equitable jurisdiction must be recognized and applied unless a statute restricts the court's equitable jurisdiction. *Porter v. Warner Holding Co.*, 328 U.S. 395, 398; *California v. American Stores Co.*, 495 U.S. 271, 295.

[7] Courts have issued mandatory injunctions requiring the payment of money on numerous occasions. *See Lincoln Properties, Ltd. v. Higgins*, 24 Envtl. L. Rep. 21068 (E.D. Cal. 1993). *See also United States v. Price*, 688 F.2d 204, 213 (3d Cir. 1982), citing *Crawford v. University of North Carolina*, 440 F. Supp. 1047 (M.D.N.C. 1977). Moreover, the

Equitable reasons buttress the legal ground for affirming the court of appeals' decision. The private party in this case (like many other private parties in other cases) does not have adequate remedies under federal or state law against the polluters of contaminated property.

CERCLA no more provides an adequate remedy precluding restitution under RCRA Section 7002(a)(1)(B) than it provides an adequate remedy precluding injunctive relief under RCRA Section 7002(a)(1)(B). Recently, several courts have limited private parties' abilities to recover response costs under CERCLA.[8] In addition, in 1994, this Court severely restricted the recoverability of attorneys' fees

---

Eighth Circuit Court of Appeals and every district court that has addressed the issue has held that a claim for recovery of response costs under CERCLA, an environmental statute like RCRA, is not an action at law for money damages but is instead an equitable action. *See United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 749 (8th Cir. 1986) (holding that when the government seeks response costs it is "seeking equitable relief in the form of restitution or reimbursement of the costs it expended in order to respond to the health and environmental danger presented by hazardous substances"). *See also Hatco Corp. v. W.R. Grace & Co. — Conn.*, 859 F.Supp. 769, 774 (D.N.J. 1994), *Thaler v. PRB Metal Products, Inc.*, 810 F.Supp. 49, 50 (E.D.N.Y. 1993) (both cases applying the *Northeastern* rule to actions between private parties). *See also United States v. Mottolo*, 605 F.Supp. 898, 912-13 (D.N.H. 1985) (citing seven cases that characterize recovery of response costs under CERCLA as equitable relief).

[8]The Courts of Appeals for the First, Seventh, and Tenth Circuits have ruled that only private parties who are "innocent" — that is, who are not liable under CERCLA — may bring cost recovery actions under CERCLA Section 107(a). Under these decisions and a ruling by the District Court for the Northern District of California, liable private parties who cannot recover their response costs can do no more than seek contribution from other liable parties under CERCLA Section 107(a). *See United Technologies v. Browning-Ferris Indus., Inc.*, 33 F.3d 96 (1st Cir. 1994), cert. denied, _U.S._, 115 S.Ct. 1176 (1995); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761 (7th Cir. 1994); reh'g en banc denied (7th Cir. 1994); *United States v. Colorado*

under CERCLA Section 107.[9] In the wake of these recent CERCLA decisions, an action for restitution under Section 7002(a)(1)(B) offers several distinct advantages over a CERCLA Section 107(a) cost recovery action or a CERCLA Section 113(f)(1) contribution action. First, RCRA Section 7002(a)(1)(B) applies to a broader range of contamination than CERCLA. Section 7002(a)(1)(B) can be used to obtain restitution of private parties' costs of responding to solid and hazardous wastes as broadly defined in RCRA Sections 1004(5) and 1004(27), whereas CERCLA can only be used to recover private parties' costs of responding to hazardous substances as defined in CERCLA. 42 U.S.C. § 6903(5) (defining "hazardous waste" as used in RCRA); 42 U.S.C. § 6903(27) (defining "solid waste" as used in RCRA); and 42 U.S.C. § 9601(27) (defining "hazardous substances" as used in CERCLA).[10] Second, to be recoverable under RCRA Section 7002(a)(1)(B), private parties' response costs need only be incurred in response to conditions that may present an imminent and substantial endangerment to the environment or health, and need only be reasonable. In contrast, CERCLA allows private parties to recover only those costs of cleanup that are necessary and consistent with the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"). 42 U.S.C. § 9607(a)(4)(B).[11] Third, under RCRA Section

---

& E.R.R., 50 F.3d 1530 (10th Cir. 1995); *Kaufman & Broad — South Bay, Inc. v. Unisys Corp.*, 868 F.Supp. 1212 (N.D.Cal. 1994).

[9]*Key Tronic v. United States*, _U.S._, 114 S.Ct. 1960 (1994).

[10]For succinct explanations of these terms, see J. Martin Robertson, *The 'Lincoln Properties' Case: Shifting the Burden of Response*, 8 Tox.L.Rep. 1395, 1401-02. *See also* Adam Babich, *RCRA Imminent Hazard Authority: A Powerful Tool for Businesses, Governments, and Citizen Enforcers*, 24 Envtl.L.Rep. 10122, 10124-27 (March 1994).

[11]Proving consistency with the NCP can be difficult and burdensome because of the evidence that must be offered, even though some courts only require private party plaintiffs to demonstrate substantial compli-

7002(a)(1)(B), private parties may impose joint and several liability for restitution of all response costs on the parties who contributed to the handling, storage, treatment, transportation, or disposal of solid or hazardous waste. *See Lincoln Properties, Ltd. v. Higgins*, 23 Envtl.L.Rep. 20665, 20672 (E.D.Cal. 1993) (concluding that the defendants' liability under RCRA Section 7002(a)(1)(B) was joint and several). And, fourth, RCRA Section 7002(e) specifically provides that courts may award litigation costs, including reasonable attorneys' fees, expert witness fees and other litigation expenses, to private parties who prevail or substantially prevail in an action under Section 7002(a)(1)(B) of RCRA. By contrast, private parties generally may not recover attorneys' fees associated with prosecuting cost recovery actions under CERCLA. State law does not provide an adequate remedy either.

Finally, it is important, for public policy reasons to have a restitutionary remedy under RCRA Section 7002(a)(1)(B). The availability of restitution under Section 7002(a)(1)(B) will promote the cleanup of contamination by private parties who, without such incentive, might not engage in cleanup. Prompt, private cleanup was an objective Congress intended to promote when it amended Section 7002(a) in 1984.[12] The Ninth Circuit was right to recognize the importance of this objective.

---

ance with the NCP. *See, e.g., Wickland Oil Terminals v. ASARCO, Inc.*, 792 F.2d 887, 891-92, (9th Cir. 1986); *NL Indus. v. Kaplan*, 792 F.2d 896, 898-99 (9th Cir. 1986) (holding that a private-party plaintiff need not show strict compliance with the NCP to establish consistency with its provisions); *see also* 40 C.F.R. § 300.700(c)(3)(i); 55 Fed.Reg. 8666, 8858 (Mar. 8, 1990) (providing that a private-party plaintiff need only show substantial compliance with the NCP to establish consistency with its provisions).

[12]The courts have recognized that Congress amended the RCRA citizen suit provision in 1984 to "invigorate citizen litigation" and to "provide a private means of obtaining the same relief that the EPA has

Addressing Congress' intent in *Bayless Investment & Trading Co. v. Chevron U.S.A., Inc.*, the Arizona District Court noted that:

> If this court were to adopt a rule that would allow a plaintiff to obtain an injunction to require responsible parties to clean up the contamination but would not allow the same plaintiff to recover the costs that he has spent in initiating prompt [cleanup], the court would provide future plaintiffs with an incentive to wait until the conclusion of a lawsuit before spending money to commence remediation. Such a ruling would frustrate clearly delineated congressional objectives and be contrary to the purposes of RCRA.

39 Envtl. Rep. Cas. 1428, 1432 (D. Ariz. May 1994).

B. The Petitioners Inappropriately Apply The Analysis Under *Cort v. Ash* To Determine The Extent Of Relief Available Under RCRA Section 7002(a).

Petitioners incorrectly apply the analysis for an implied private right of action under *Cort v. Ash*, 422 U.S. 66 (1975), to assess what relief may be available under the RCRA citizen suit provision which is expressly set forth in Section 7002(a) of RCRA, 42 U.S.C. § 6972(a). It is clear that Congress, in enacting RCRA Section 7002(a), created an express right of action for private parties to sue under RCRA. Because of this, the Court need not conduct an

---

previously been authorized to seek under RCRA." *Lincoln Properties, Ltd. v. Higgins*, 23 Envtl.L.Rep. 20665, 20669-70 (citing *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1158 (9th Cir. 1989)); *Middlesex County Bd. of Chosen Freeholders v. New Jersey*, 645 F.Supp. 715, 721 (D.N.J. 1986).

analysis under *Cort v. Ash* to determine whether an implied right of action exists. The Eighth Circuit Court of Appeals was wrong in doing so in *Furrer v. Brown*, 62 F.3d 1092 (8th Cir. 1995), which was decided after the Ninth Circuit entered its decision in this case.

The issue before the Court is not whether a private right of action should be implied under RCRA Section 7002(a)(1)(B), but whether Section 7002(a)'s provision empowering the court to "order . . . such other action as may be necessary" affords restitution to private parties. 42 U.S.C. § 7002(a)(2). *See also Anderson v. Thompson*, 658 F.2d 1205, 1210 n.7 (7th Cir. 1981). Clearly, "[t]he question of what remedies are available under a statute that provides a private right of action is 'analytically distinct' from the issue of whether such a right exists in the first place." *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 65-66 (1992); *Davis v. Passman*, 442 U.S. 228, 239 (1979); *Lieberman v. Univ. of Chicago*, 660 F.2d 1185, 1186-87 & 1187, n.4 (7th Cir. 1981). Moreover, the determination of what relief is available under a private right of action must not be considered until *after* a court determines whether the private right of action exists at all. *Cf. Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 69 (1992) ("Whether Congress may limit the class of persons who have a right of action under Title IX is irrelevant to the issue in this lawsuit. To reiterate, 'the question whether a litigant has a "cause of action" is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive.'")

Clearly, the *Cort v. Ash* analysis is an inappropriate vehicle for determining the extent of relief available under an express private right of action. Indeed, other courts have previously rejected the application of the *Cort v. Ash* analysis to determine available remedies under a expressly created private right of action. For example, the Eighth Circuit

rejected the application of the *Cort v. Ash* analysis in interpreting the extent of relief provided by an express right of action under the Education of the Handicapped Act, which authorizes "such relief as the [district] court determines is appropriate." *See Miener v. Missouri*, 673 F.2d 969, 979 (8th Cir. 1982) (quoting 20 U.S.C. § 1415(e)(2)).

The correct analysis for determining the extent of relief available under an express right action involves statutory interpretation, including consideration of "the statutory language, the legislative history, and the purposes Congress wished to achieve." *See Anderson v. Thompson*, 658 F.2d 1205, 1210 (7th Cir. 1981). It does not involve using a *Cort v. Ash* analysis to determine whether a private litigant is entitled to relief under the federal statute.

II

The Ninth Circuit Correctly Determined That Restitutionary Relief Is Available To Private Parties Where Private Parties Responded To Conditions Which May Present An Endangerment Before Filing Suit.

Petitioners contend that the RCRA citizen suit provision may never be used where an imminent and substantial endangerment presented by the disposal of wastes has been remedied before suit is filed. Petitioners argue that the Ninth Circuit's contrary holding is barred by this Court's decision in *Gwaltney v. Chesapeake Bay Found.*, 484 U.S. 49, 52, 66-67 (1987), which held that citizen suits may not be brought for "wholly past violations" of the Clean Water Act.[13] Petitioners' argument is specious.

Unlike the Clean Water Act provision, the RCRA citizen suit provision expressly allows suits concerning past conduct.

---

[13]The Clean Water Act was formerly known as the Federal Water Pollution Control Act ("FWPCA").

Indeed, *Gwaltney* itself specifically cited Section 7002(a)(1)(B) of RCRA for the proposition that "Congress has demonstrated in yet other statutory provisions that it knows how to avoid this prospective implication by using language that explicitly targets wholly past violations." *Gwaltney v. Chesapeake Bay Found.*, 484 U.S. 49, 57 (1987). Petitioners' attempt to rely upon *Gwaltney* for the proposition that "wholly past harms" (which, of course, cannot be meaningfully distinguished from "wholly past violations") are not redressable under RCRA is misplaced.

Moreover, as noted above with respect to *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), the citizen suit provision of the Clean Water Act does not contain the critical language allowing a court to order "such other action as may be necessary." Accordingly, *Gwaltney*, like *Sea Clammers*, cannot be relied on to dictate a limiting construction of that language. Contrary to petitioners' assertions, the statutory language actually used in RCRA does matter, and the significant differences between this language and the provisions of other environmental statutes precludes an attempt to fabricate an overarching "history" or "purpose" of citizen suits that overrides the express statutory text.

Both the Eighth and the Ninth Circuits have concluded that the "imminent and substantial endangerment" language limits the sites as to which a RCRA action can be filed, not the time at which such an action should be filed. *KFC Western, Inc. v. Meghrig*, 49 F.3d at 521; *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d at 1383. Petitioners do not cite a credible authority to the contrary; instead, they rely on *Gwaltney* for their argument that a RCRA suit is barred when the imminent and substantial endangerment has been addressed before suit is filed. Because there is no dispute here that the site has posed an "imminent and

substantial endangerment," RCRA was appropriately utilized with respect to the contamination at the site.

Petitioners' narrow interpretation of the "may present an imminent and substantial endangerment" language of Section 7002(a)(1)(B) would effectively foreclose all lawsuits where a plaintiff took the initiative to clean up contamination before it dispersed. Prospective plaintiffs would have to litigate their RCRA claims before they could clean up contamination to preserve their ability to recover restitutionary relief. Meanwhile, contamination would continue to seep into the soil and groundwater. Clearly, this is not what Congress had in mind when it enacted RCRA. Congress sought to facilitate the prompt abatement of contamination which may present endangerment to health or the environment when it enacted RCRA.

Conclusion

For all these reasons, the decision of the United States Court of Appeals for the Ninth Circuit in this case should be affirmed.

Dated: December 7, 1995.

Respectfully submitted.

WILLIAM N. KAMMER
Counsel of Record

J. MARTIN ROBERTSON
ROBERT C. LONGSTRETH
LARRY J. BRADFISH

GRAY CARY WARE &
FREIDENRICH
A Professional Corporation
401 B Street, Suite 1700
San Diego, California 92101
619-699-2711

400 Hamilton Ave.
Palo Alto, California 94301
415-328-6561

Counsel For Kaufman And Broad Home Corporation And Kaufman And Broad — South Bay, Inc.

(10)

Supreme Court, U.S.
FILED
DEC 8 1995
CLERK

No. 95-83

In The

Supreme Court of the United States

October Term, 1995

ALAN MEGHRIG AND MARGARET MEGHRIG,
Petitioners,

vs.

KFC WESTERN, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF FOR THE STATE OF LOUISIANA THROUGH ITS DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

Lawrence A. Dorsey
General Counsel
Counsel of Record
James M. Beckner
Senior Attorney
Office of General Counsel
Louisiana Department of
Transportation and Development
Post Office Box 94245
Baton Rouge, Louisiana 70804
(504) 379-1207

Charley Hutchison
Suite 105, 412 West University
Lafayette, Louisiana 70506
(318) 237-4102
Special Counsel

William M. Hudson, III
Edgar D. Gaubenstoff
Robert A. Mahtook, Jr.
Victoria A. Guidry
Lawrence E. Marino
OATS & HUDSON
Suite 400, Gordon Square
100 East Vermilion Street
Lafayette, Louisiana 70501
(318) 233-1100
Special Counsel

Counsel for Amicus Curiae
State of Louisiana
Through Its Department of
Transportation and Development

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. SECTION 6972(A)(1)(B) OF RCRA PROVIDES PRIVATE CITIZENS WITH THE RIGHT TO RESTITUTION FROM THE RESPONSIBLE PARTIES FOR THE COSTS OF REMEDIATING HAZARDOUS WASTE 6

A. Remediation Expenditures May Be Recovered Pursuant to the RCRA Citizen's Suit Provision 6

1. The Plain Language of the Citizen's Suit Provision Authorizes Restitutionary Relief. . . . 7

2. The Purposes For Which RCRA Was Enacted Are Advanced By An Interpretation of the Citizen's Suit Provision Permitting Recovery of Remediation Expenditures. 8

3. Plaintiffs Are the Intended Beneficiaries of the Citizen's Suit Provision 10

4. The Reasonableness of Remediation Expenditures Pursuant to RCRA Can Be Assessed Adequately. 11

B. *Equity Permits Restitution of Remediation Expenditures in the Context of a RCRA Citizen's Suit* 12
1. The Courts Have the Inherent Power to Apply the General Principles of Equity and to Provide Equitable Restitution. 13
2. The Language of RCRA Evidences the Availability of Equitable Restitution. 14
3. Reason Leads to the Logical Conclusion That Because the Equitable Defense of *Laches* Is Available, the Equitable Remedy of Restitution Must Also Be Available. 17

II. THE "IMMINENT AND SUBSTANTIAL ENDANGERMENT" MUST EXIST WHEN REMEDIATION IS INITIATED. 19

III. RECOVERY OF REMEDIATION EXPENDITURES IS PROPER UNDER RCRA REGARDLESS OF THE APPLICABILITY OF CERCLA. 20
A. *CERCLA Has Not Preempted the Fields of Remediation or Recovery of Remediation Expenditures.* 21
B. *CERCLA and RCRA Are Independent Statutes Which Apply to Different Classes of Hazardous Materials.* 22
C. *RCRA Contains No Exclusion Comparable in Scope or Substance to the CERCLA Petroleum Exclusion.* 22
D. *Leaking Underground Gasoline Storage Tanks Are Regulated Pursuant to RCRA.* . . . 26

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

Agricultural Excess & Surplus Ins. Co. v. A.B.D. Tank & Pump Co.,
878 F.Supp. 1091 (E.D. Ill. 1995) 22, 27

Amoco Oil Co. v. Borden, Inc.,
889 F.2d 664 (5th Cir. 1989) 27

Bayless Investmt. & Trading Co. v. Chevron U.S.A.,
39 E.R.C. (B.N.A.) 1428 (D.Ariz. 1994) 20

Blood v. Fleming,
161 F.2d 292 (10th Cir. 1947) 13

Bollinger and Boyd Barge Services, Inc. v. Motor Vessel, Captain Claude Bass,
576 F.2d 595 (5th Cir. 1978) 13, 18

Chapman v. Houston Welfare Rights Org.,
441 U.S. 600, 99 S.Ct. 1905 (1979) 8

Citizens and Landowners Against the Miles City/New Underwood Powerline v. Secretary, United States Department of Energy,
683 F.2d 1171 (8th Cir. 1982) 17

City of Chicago v. Environmental Defense Fund,
__ U.S. __, 114 S.Ct. 1588 (1994) 9

Costello v. United States,
305 U.S. 265, 81 S.Ct. 534 (1961) 17

Cowart v. Wicklos Drilling Co.,
___ U.S. ___, 112 S.Ct. 2589 (1992) 7

Craig Lyle Ltd. Partnership v. Land O'Lakes, Inc.,
877 F.Supp. 476 (D. Minn. 1995) 22, 27

Hecht Co. v. Bowles,
321 U.S. 321, 64 S.Ct. 587 (1944) 8, 13, 15

Johnson v. Kay,
860 F.2d 529 (2d Cir. 1988) 7

KFC Western, Inc. v. Meghrig,
49 F.3d 518 (9th Cir. 1995) . . . . . *passim*

Morrissey v. Bologna,
123 So.2d 537 (Miss. 1960),
cert. denied, 81 S.Ct. 1091 13

Niecko v. EMRO Marketing Co.,
769 F.Supp. 973 (E.D. Mich. 1991) 23

Porter v. Warner Holding Co.,
328 U.S. 395, 66 S.Ct. 1086 (1946) 8

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.,
484 U.S. 49, 108 S.Ct. 376 (1987) 8

United States v. Aceto Agricultural Chemicals Corp.,
872 F.2d 1373 (8th Cir. 1989) 20, 21

United States v. Conservation Chemical Company,
619 F.Supp. 162 (W.D. Mo. 1985) 18

United States v. Dickerson,
640 F.Supp. 448 (D. Md. 1986) 18

United States v. Mottolo,
605 F.Supp. 898 (D.N.H. 1985) 18

United States v. Reilly Tar and Chemical Co.,
546 F.Supp. 1100 (D. Minn. 1982) 17

Wilshire Westwood Associates v. Atlantic Richfield Corp.,
881 F.2d 801 (9th Cir. 1989) 23

Winston v. Shell Oil,
861 F.Supp. 713 (C.D.Ill. 1984) 27

Wyandotte Transp. Co. v. United States,
389 U.S. 191, 88 S.Ct. 379 (1967) 16

Zands v. Nelson,
779 F.Supp. 1254 (S.D. Cal. 1991) 22, 27

STATUTES

Comprehensive Environmental Resource Conservation, Liability and Recovery Act of 1980,
Pub. L. No. 96-510, *codified at* 42 U.S.C. § 9601, *et seq.* 3, 24

42 U.S.C. § 9601(14) 15, 22

42 U.S.C. § 9659(h) 21

Hazardous and Solid Waste Amendments of 1984,
Pub.L. No. 98-616, 98 Stat. 3221 (1984) 6, 17, 24

Resource Conservation and Recovery Act, 42 U.S.C. § 6901, *et seq.* 2

42 U.S.C. § 6902(a)(4) 9

42 U.S.C. § 6902(b) 9

42 U.S.C. § 6921(b)(2)(A) 24

42 U.S.C. § 6921(b)(2)(B) 24

42 U.S.C. § 6972(a)(1)(B) . . . . . *passim*

42 U.S.C. § 6972(a) (1984) 6

42 U.S.C. § 6972(f) 14, 15

42 U.S.C. § 6991, *et seq.* 26

Superfund Amendment and Reauthorization Act of 1986, Pub.L. No. 99-499, 100 Stat. 1613 (1986) 17

La. R.S. 30:2271(4)(c)3, 15

Cal.Health & Safety Code § 25317 15

MISCELLANEOUS

Robert N. Aguilez, *Refining CERCLA's Petroleum Exclusion,* 7 TULANE ENV. L.J. 41, 64 (1993) 26

27 Am Jur. 2d Equity § 1 12

27 Am Jur. 2d Equity § 2 12

27 Am Jur. 2d Equity § 23 11

27 Am Jur. 2d Equity § 86 12

27 Am Jur. 2d Equity § 87 12

27 Am Jur. 2d Equity § 104 14

27 Am Jur. 2d Equity § 119 18

27 Am Jur. 2d Equity § 120 13

27 Am Jur. 2d Equity § 121 12

27 Am Jur. 2d Equity § 123 13

James Baller, *The Petroleum Exclusion - Stronger Than Ever After* Wilshire Westwood, 43 SOUTHWESTERN L.J. 915, 918 (1990) 23

BLACK'S LAW DICTIONARY (6th ed. 1990) 7, 12

30A C.J.S. Equity § 6(c) 13

30A C.J.S. Equity § 20 12

30A C.J.S. Equity § 93 13

30A C.J.S. Equity § 94 . . . . . 11, 12

30A C.J.S. Equity § 95 11

30A C.J.S. Equity § 118 13

30A C.J.S. Equity § 119 18

30A C.J.S. Equity § 120 13

30A C.J.S. Equity § 129 17

43 C.J.S. Injunctions § 7 7

126 Cong. Rec. H11,976 (Dec. 3, 1980) 24

130 Cong. Rec. S2028 (Feb. 29, 1984) 27

S. COOKE, THE LAW OF HAZARDOUS WASTE (1995) 21

EPA, *Clarification of the Regulatory Determination for Wastes from the Exploration Development and*

Production of Crude Oil, Natural Gas and Geothermal Energy, 58 Fed. Reg. 15,284 (March 22, 1993) 26

EPA, EXECUTIVE SUMMARIES, REPORT TO CONGRESS: MANAGEMENT OF WASTES FROM THE EXPLORATION, DEVELOPMENT, AND PRODUCTION OF CRUDE OIL, NATURAL GAS, AND GEOTHERMAL ENERGY, Pt. 1, p. 7 n.1 (1987) 25

EPA General Counsel, *Scope of CERCLA Petroleum Exclusion Under Sections 101(14) and 104(a)(2)* 5 (July 31, 1987) 23

50 Fed. Reg. 13,456 (April 4, 1985) 23

51 Fed. Reg. 8,206 (March 10, 1986) 23

House Conf. Rep. No. 96-1444, Joint Explanatory Statement of the Committee of Conference, *reprinted in* 1980 U.S.C.C.A.N. 5019, 5031 25

RESTATEMENT OF RESTITUTION (1937) 13

WEBSTER'S NEW COLLEGIATE DICTIONARY (1979) 7

No. 95-83

In The

Supreme Court of the United States

October Term, 1995

ALAN MEGHRIG and MARGARET MEGHRIG,
Petitioners,

vs.

KFC WESTERN, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF FOR THE STATE OF LOUISIANA THROUGH ITS DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS CURIAE

The Louisiana Department of Transportation and Development ("DOTD"), an agency of the State of Louisiana charged with the construction and maintenance of highways, frequently encounters hazardous waste in the rights-of-way that it has purchased or expropriated. Typically, when such materials are discovered during highway construction, compliance with Louisiana and federal environmental laws necessitates immediate

cessation of construction, pending investigation and/or remediation of the site. When construction is stopped, DOTD is usually obligated under industry-standard highway construction contracts to pay "delay damages" to the contractors building the highways. DOTD incurs significant costs when forced to delay construction to comply with environmental laws.

Once a site is determined to contain hazardous materials, DOTD must decide whether to remediate immediately at its own expense in order to minimize the threat to human health and the environment as well as the contractual delay damages, or to permit the threat to remain unabated and to incur significantly greater delay damages by allowing the highway construction site to remain closed until the responsible parties are identified and mandated to remediate the site.

DOTD has consistently and reasonably opted in favor of the former by remediating sites as quickly as possible and then recommencing highway construction. To date, DOTD has encountered approximately forty (40) sites at which remediation costs have been incurred. DOTD estimates that it has spent tens of millions of state taxpayer funds and federal matching dollars in remediating these sites. This money would otherwise have been used to repair Louisiana's highways, complete unfinished highways, or construct new highways. DOTD cannot overemphasize the fact that it is in no way responsible for the presence of the hazardous materials at these sites. Moreover, it is suggested that the highway departments of the other forty-nine (49) states may be similarly situated with respect to environmental remediation, and that the combined financial cost to the nation's taxpayers is staggering.

DOTD is aggressively pursuing responsible parties to recover the funds that DOTD has spent on remediation of the hazardous waste it has encountered. The holding of the United States Court of Appeals for the Ninth Circuit in the present case confirms that the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*, confers upon private citizens, including government agencies, the valuable right to recover the costs of remediation from the parties who are truly

responsible for the presence of the hazardous materials. *KFC Western, Inc. v. Meghrig*, 49 F.3d 518, 521 (9th Cir. 1995).

DOTD's ability to recover these costs will be seriously jeopardized if this Honorable Court does not affirm the Ninth Circuit's holding. Louisiana is a major petroleum-producing state, with large petroleum refining and petrochemical industries. Therefore, the "petroleum exclusion" contained in the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, 42 U.S.C. § 9601(14), and Louisiana's analogous state environmental law, La. R.S. 30:2271(4)(c), may render recovery of remediation expenses at many sites difficult or impossible. Furthermore, as the Ninth Circuit noted, state "common law" remedies (which are necessarily statutory under Louisiana's civil law system), such as nuisance, trespass, negligence, and breach of warranty, are severely limited as a result of the difficulties of proof, short statutes of limitation, and the fact that the hazardous materials present at the sites were usually placed there by or with the acquiescence of the former owners of the property.

DOTD fully intends to continue to act in the best interest of the public health and the environment, but its funds are not unlimited, particularly in light of the current trend toward reducing governmental budgets. The facts of the present case involve only a party who has encountered hazardous waste in a single instance. Many entities encounter hazardous waste sites repeatedly, such as state highway departments, other government agencies, land development companies, and gas or power companies when constructing pipelines or power transmission lines. Such entities cannot fund environmental remediation indefinitely, without restitution of these funds. Precluding recovery of these funds by DOTD (and other entities that encounter hazardous waste repeatedly) will therefore ultimately thwart efforts to curtail endangerment to human health and the environment, because such entities will no longer be able to afford to remediate these sites.

Accordingly, DOTD respectfully represents to this Honorable Court that it will suffer significant losses if the opinion below is not affirmed. Specifically, DOTD will be left without an adequate state, federal, or equitable remedy for recovery of the

state and matching federal dollars that it has expended in remediating hazardous waste for which other parties should be responsible under RCRA.

SUMMARY OF ARGUMENT

The plain language of RCRA's citizen suit provision, conferring authority upon the courts to "restrain" responsible parties, to order such parties to "take such other action as may be necessary," or "both," clearly authorizes not only mandatory and prohibitory injunctive relief, but also restitutionary relief. Given RCRA's beneficial purpose of speedy remediation of hazardous waste sites presenting a threat to the public health or the environment, the "most natural" interpretation of the residual power is that it authorizes the courts to require the parties responsible for the improper disposal of hazardous waste to repay others who have remediated the contaminated sites in question. This interpretation maximizes private citizens' incentive to remediate and minimizes the delay within which remediation may be performed.

Citizens' suits under RCRA invoke the courts' traditional powers of equity, and therefore courts may order the equitable remedy of restitution pursuant to RCRA. Equity may require repayment by a person whose duty to the public has been performed by another, because equity resolves disputes in accordance with the principles of justice and fairness. Justice would be frustrated if an innocent party were forced to bear the ultimate responsibility for and cost of remediating hazardous waste properly attributable to another party. Moreover, there is no functional difference between requiring a responsible party to remediate a site, which Petitioners admit is permissible, and requiring such a person to repay another who has already remediated the site.

RCRA expressly preserves all of the citizen's suit plaintiff's rights to relief, including equitable relief. Thus, the courts' authority to order the responsible parties to take "such other action as may be necessary" includes equitable relief, and the

remedy of restitution should be available to citizen's suit plaintiffs, in the proper circumstances.

Furthermore, the "imminent and substantial endangerment" necessary to give rise to liability under RCRA's citizen's suit provision need exist only at the time remediation is undertaken, because any other interpretation would frustrate the purposes for which the citizen's suit provision was enacted.

Finally, it is irrelevant to the propriety of claims for recovery of remediation expenditures under RCRA whether recovery is also permissible under CERCLA. CERCLA does not preempt the field of remediation or recovery of remediation expenditures. RCRA and CERCLA are entirely independent statutes, and therefore, even if the leaded gasoline at issue in the present case is properly exempted from CERCLA as a result of CERCLA's petroleum exclusion, recovery of KFC's remediation expenditures under RCRA is proper because RCRA contains no such restriction.

ARGUMENT

I. SECTION 6972(A)(1)(B) OF RCRA PROVIDES PRIVATE CITIZENS WITH THE RIGHT TO RESTITUTION FROM THE RESPONSIBLE PARTIES FOR THE COSTS OF REMEDIATING HAZARDOUS WASTE.

A. Remediation Expenditures May Be Recovered Pursuant to the RCRA Citizen's Suit Provision.

RCRA, prior to its amendment in 1984, authorized private citizens to file suit only to "enforce [a] regulation or order, or to order the Administrator to perform such act or duties as the case may be." 42 U.S.C. § 6972(a) (1984). The 1984 amendments substantially broadened the scope of the citizen's suit provision by adding subsection 6972(a)(1)(b), pursuant to which a citizen may obtain a court order:

> to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste [which may present an imminent and substantial endangerment to health or the environment], to order such person to take such other action as may be necessary, or both.

Hazardous and Solid Waste Amendments of 1984, Pub.L. No. 98-616, 98 Stat. 3221 § 402, *codified at* 42 U.S.C. § 6972(a)(1)(B).

The Ninth Circuit in its opinion in the present case held that the relief contemplated by the phrase, "... such other action as may be necessary," includes restitutionary relief, such as repayment by the responsible party of the costs of remediation incurred by the citizen's suit plaintiff. *KFC*, 49 F.3d at 521. Petitioners, however, argue that RCRA's citizen's suit provision authorizes only injunctive relief, and only with respect to an "imminent endangerment" in existence at the time suit is filed. Brief for the Petitioner at 13-18, *Meghrig v. KFC Western, Inc.*,

__ U.S. __ (19__) (No. 95-83) ("Petitioners' Brief"). Petitioners' interpretation of the statute is unduly narrow, and supported by neither RCRA's language nor its purpose.

1. The Plain Language of the Citizen's Suit Provision Authorizes Restitutionary Relief.

Judicial inquiry as to the proper interpretation of a statute must end with its language when the meaning is clear. *Cowart v. Wicklos Drilling Co.*, ___ U.S. ___, 112 S.Ct. 2589, 2594 (1992). RCRA's citizen's suit provision authorizes courts to award plaintiffs three (3) forms of relief: (1) "... to restrain any person"; (2) "... to order such person to take such other action as may be necessary"; or (3) "both." 42 U.S.C. § 6972(a)(1)(B). The plain language of the statute, authorizing courts to order any action that is "necessary", logically includes the restitutionary relief sought by KFC because the definition of "necessary" is not limited by the language of the provision to injunctive relief.

The relief contemplated by the authorization "... to restrain any person" indisputably includes injunctive relief, as Petitioners concede. Petitioners' Brief at 14. Injunctive relief includes both prohibitory injunctions, which preserve the *status quo*, and mandatory injunctions, which disturb the *status quo* by ordering affirmative relief. *Johnson v. Kay*, 860 F.2d 529, 541 (2d Cir. 1988); 43 C.J.S. Injunctions § 7 ("an injunction is mandatory or [prohibitive] according to whether it directs a person to do a particular thing or to refrain from doing an act"); BLACK'S LAW DICTIONARY 784-85 (6th ed. 1990).

To "restrain" means to "prevent from doing" or to "limit, restrict, or keep under control." WEBSTER'S NEW COLLEGIATE DICTIONARY 979-80 (1979). The retrospective language contained in the citizen's suit provision authorizing a court to order restraint of "any person who *has contributed ... to the past* ... handling, storage, treatment, transportation, or disposal of any solid or hazardous waste" that presents an imminent and substantial endangerment to health or the environment, is expressly directed to *past* conduct. 42 U.S.C. § 6972(a)(1)(B) (emphasis added). An order issued with respect to such conduct would necessarily require

affirmative action to abate the endangerment because the person to whom such an order would be issued would no longer be doing anything that could be prohibited. Consequently, the authorization to "restrain" includes the power to issue a mandatory injunction ordering a responsible party to remediate the endangerment.

Accordingly, both prohibitory and mandatory relief is contemplated by the phrase, "... to restrain any person," and therefore the phrase, "... such other action as may be necessary," may not reasonably be interpreted, as Petitioners urge, Petitioners' Brief at 14, merely to restate the authorization of mandatory injunctive relief already provided by the former phrase. *See Porter v. Warner Holding Co.*, 328 U.S. 395, 399, 66 S.Ct. 1086, 1089 (1946); *Hecht Co. v. Bowles*, 321 U.S. 321, 328, 64 S.Ct. 587, 591 (1944) (authority to grant injunctive relief or "other order" contemplates a remedy other than an injunction, including equitable relief). Such redundancy is particularly unlikely to represent Congressional intent in light of the final words of the sentence, "or both." The inclusion of these words indicates unequivocally that the preceding phrases represent alternative remedies, and that neither constitutes a reiteration of the other. Rather, further relief is clearly authorized.

Contrary to Petitioners' arguments, Petitioners' Brief at 35, the Ninth Circuit has not created a new right of action by implication with its decision in this case; it has simply recognized an alternative remedy already provided by Congress.

2. The Purposes For Which RCRA Was Enacted Are Advanced By An Interpretation of the Citizen's Suit Provision Permitting Recovery of Remediation Expenditures.

When the language of a statute is ambiguous, a court must adopt the "most natural" interpretation of that provision. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 57, 108 S.Ct. 376, 381 (1987). As in all cases of statutory construction, the words of the statute must be interpreted in light of the purposes Congress sought to serve. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608, 99 S.Ct. 1905, 1911

(1979). Therefore, even if the language of RCRA's citizen's suit provision were ambiguous, its proper interpretation may be ascertained only by reference to the purposes for which RCRA and its citizen's suit provision were enacted.

One of RCRA's stated purposes is to "assur[e] that hazardous waste management practices are conducted in a manner which protects human health and the environment." 42 U.S.C. § 6902(a)(4). Hazardous waste disposed of in a manner that endangers health or the environment violates this policy, and must not be permitted to remain unabated. Further, Congress established in RCRA a national goal of protecting the public from the dangers associated with improper handling of hazardous wastes, by stating that:

> The Congress hereby declares it to be the national policy of the United States that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Wastes that are nevertheless generated should be treated, stored or disposed of so as to minimize the present and future threat to human health and the environment.

42 U.S.C. § 6902(b). This Honorable Court, too, has recognized that RCRA's goals are to encourage resource recovery and protect against contamination. *City of Chicago v. Environmental Defense Fund*, __ U.S. __, 114 S.Ct. 1588, 1594 (1994). Clearly, these goals are best and most fully achieved when hazardous waste constituting an imminent endangerment is remediated as quickly as possible.

The purposes for which RCRA was enacted are also furthered by an interpretation of the phrase "... such other action" to include restitution of remediation costs to a citizen's suit plaintiff by the parties responsible for the presence of the waste. Such an interpretation encourages innocent parties to remediate contaminated land voluntarily, secure in the knowledge that they will be repaid by those responsible. Landowners will be more willing to remediate imminent endangerments with respect to which

federal, state, and local environmental authorities have declined to take action, whether as a result of resource constraints or for other reasons, if the landowners can expect to recover their costs. Even more importantly, permitting such recovery speeds the process of abating the dangers presented by hazardous waste, because landowners may remediate immediately and then pursue restitution from the responsible parties. These benefits would be lost if the phrase were interpreted as authorizing only injunctive relief. Under the latter interpretation, the danger presented by the waste would continue to threaten the public health and the environment until responsible parties could be identified, sued, and mandated to remedy the problem.

Given RCRA's purpose of ameliorating the problems posed by the improper disposal of hazardous waste, and the fact that this purpose is best advanced by interpreting the statutory language to include the award of restitutionary relief, interpreting the citizen's suit provision, "... such other action as may be necessary," as authorizing recovery of remediation expenditures is the "most natural" reading of that passage.

3. Plaintiffs Are the Intended Beneficiaries of the Citizen's Suit Provision.

Petitioners argue that citizens' suits under RCRA are permissible only to supplement the regulatory role of the federal government as private "attorneys general" or "enforcers" of RCRA. Petition for Writ of Certiorari at 28, *Meghrig v. KFC Western, Inc.*, __ U.S. __ (19__) (No. 95-83) ("Petition for Writ"). This position is flatly contradicted by the language of RCRA's citizen's suit provision, which states that "any person may commence a civil action *on his own behalf* ...." 42 U.S.C. § 6972(a)(1)(B). While RCRA as it existed prior to 1984 permitted a private citizen to sue only to enforce an order or regulation, the addition of the language of Subsection 6972(a)(1)(B) unambiguously grants to private citizens a right of redress, and not merely a responsibility to be exercised charitably for the good of all humanity or not at all. Accordingly, private citizens may

benefit as a result of pursuing their claims under RCRA, to the extent of recouping their remediation expenses.

Furthermore, the word "necessary" in the phrase, "... such other action as may be necessary," refers to the citizen bringing the suit, as the phrase occurs in the section entitled "Citizens' Suits." 42 U.S.C. § 6972. The relief that may be awarded thereunder should be that which is necessary to citizen's suit plaintiffs, *i.e.*, that which is necessary to restore them to their original positions.

4. The Reasonableness of Remediation Expenditures Pursuant to RCRA Can Be Assessed Adequately.

Petitioners also argue that RCRA's lack of a mechanism for determining which of the remediation expenditures by plaintiffs are recoverable indicates that RCRA was not intended to be used as a cost recovery vehicle. Petitioners' Brief at 24. This position is untenable, because the determination whether expenditures are recoverable under RCRA can be made in the same manner as in any other area of the law, through the traditional means of assessing the recoverability of costs, including contradictory hearings, expert testimony, introduction of evidence as to the reasonableness of the expenditures, and the application of traditional principles such as mitigation of damages.

The citizen's suit plaintiff seeking restitution of environmental remediation expenditures is seeking an equitable remedy, as discussed *infra*, and therefore only "reasonable" or "fair" expenditures may be recovered thereunder. 27 AM. JUR. 2D Equity §23; 30A C.J.S. Equity §§ 94-95. Significant remedial activity has been undertaken throughout the United States in recent years, primarily as a result of the impact of CERCLA and RCRA, creating a large body of knowledge regarding the cost and character of appropriate remediation expenditures. Experts in remediation and remediation technology can opine on the basis of knowledge and experience as to the necessity or reasonableness of particular remediation procedures. Moreover, CERCLA's National Contingency Plan provides a valuable yardstick against which a finder of fact can measure the reasonableness of remediation undertaken pursuant to RCRA. The absence of a statutory scheme

within RCRA by which to determine whether remediation expenditures were proper is irrelevant to the propriety of permitting the recovery of such expenditures.

Finally, permitting RCRA citizen's suit claims with respect to underground storage tanks ("USTs") will not, as Petitioners allege, Petition for Writ at 17, remove such claims improperly and *en masse* from state to federal court. The RCRA citizen's suit provision authorizes recovery of remediation expenditures only with respect to "imminent endangerments," 42 U.S.C. § 6972(a)(1)(B), and therefore only suits in which there is an imminent endangerment can be shifted to federal court from state court. The federal courts will not be overwhelmed by remediation claims because only a fraction of hazardous waste sites present an imminent endangerment within the meaning of RCRA. Additionally, it must be remembered that RCRA causes of action *may* be sued upon in state court. More importantly, however, it would be inappropriate to interpret a statute in a particular manner purposefully to ensure that fewer citizens will be able make use of it, especially when the statute has a purpose as beneficial as the remediation of imminent endangerment to human health or the environment.

B. Equity Permits Restitution of Remediation Expenditures in the Context of a RCRA Citizen's Suit.

KFC may also obtain restitution of its remediation expenditures pursuant to the courts' broad, inherent authority in equity.

Equity is a system of jurisprudence that resolves disputes according to the dictates of justice, or fairness, rather than according to the strictly formulated rules of the common law. 27 AM. JUR. 2D Equity §§ 1, 121; BLACK'S LAW DICTIONARY 540 (6th ed. 1990). Equity applies when the law does not provide an adequate remedy, and proceeds flexibly, case-by-case and on a highly fact-specific basis, as fairness necessarily depends heavily upon the particular facts of a given situation. *See* 27 AM. JUR. 2D Equity §§ 2, 86-87; 30A C.J.S. Equity §§ 20, 94.

Equitable relief, in the form of equitable restitution of remediation expenditures, is available in the context of a RCRA citizen's suit action. The award of equitable restitution is properly awarded through the courts' inherent equitable power to do justice, as well as under the statutory language preserving the right to equitable relief pursuant to RCRA itself.

1. The Courts Have the Inherent Power to Apply the General Principles of Equity and to Provide Equitable Restitution.

Where there is statutory law, equity follows the law. 27 AM. JUR. 2D Equity § 123; 30A C.J.S. Equity § 118. Nevertheless, even when an area of substantive law is addressed by statute, the courts retain their inherent jurisdiction in equity unless the statute specifically restricts that jurisdiction. *Porter*, 328 U.S. at 398; 30A C.J.S. Equity § 6(c). Equity goes beyond the statute to provide the necessary remedy when the given legal procedure is inadequate, provided that it is just to do so. *Bollinger and Boyd Barge Services, Inc. v. Motor Vessel, Captain Claude Bass*, 576 F.2d 595, 597-98 (5th Cir. 1978); and *Morrissey v. Bologna*, 123 So.2d 537, 543 (Miss. 1960), *cert.* denied, 81 S.Ct. 1091. Equity will not suffer a wrong to be without a remedy. 27 AM. JUR. 2D Equity § 120; and 30A C.J.S. § 120.

The equitable remedy of restitution, or repayment for costs expended, is available when a person performs another's duty to the public, even without the other's knowledge or consent, when the former intends to charge the latter for the services, and the performance is necessary to the public safety. RESTATEMENT OF RESTITUTION §§ 114, 115 (1937). Restitution should be granted when good conscience demands it. *Hecht*, 321 U.S. at 326; *Blood v. Fleming*, 161 F.2d 292, 296 (10th Cir. 1947); 30A C.J.S. Equity § 93. Conscience demands that the party who causes harm should pay to remedy the damage. Accordingly, under the proper circumstances, equity will require that the party who is responsible for the creation of an imminent and substantial endangerment must remediate the hazardous waste causing the danger. Petitioners

admit that this result is proper in the context of a citizen's suit under RCRA. Petition for Writ at 11.

The next logical step, however, is to require the responsible party to repay the innocent citizen who actually undertook the remediation. There is no logical or functional difference between payment for remediation and repayment to an innocent third person who has paid for the remediation; the same result of requiring the person causing the harm to bear the expense of remediating the damage is obtained either way. Thus, restitution represents the fair and equitable resolution required by good conscience, and it is an appropriate equitable remedy under RCRA.

Repayment is simply shifting the burden of remediation back to the party who is ultimately responsible for the presence (and therefore the remediation) of the hazardous waste. Such restitution is more nearly akin to repayment of a debt than to payment of damages. Thus, in the present case, KFC seeks only repayment of a debt due as a result of KFC having paid for remediation that should have been paid by the Meghrigs (assuming for purposes of this case, as we must, that the factual allegations of KFC's Complaint are true).

Furthermore, courts go much further to provide relief in furtherance of the public interest than when purely private interests are involved. 27 AM. JUR. 2D Equity § 104. The compelling public interest in speedy remediation of hazardous waste is a critical consideration supporting the award of restitutionary relief in the present case.

2. The Language of RCRA Evidences the Availability of Equitable Restitution.

Two separate components of RCRA's citizen's suit provision evidence Congressional intent to allow courts to retain their traditional powers of equity with respect to citizen suits, and to provide the equitable relief that justice demands.

First, 42 U.S.C. § 6972(f) provides that:

> Nothing in this section [the citizen's suit provision] shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency).

Subsection 6972(f) clearly leaves available to the courts the ability to provide "any other relief," including equitable relief. This language does not preclude the exercise of the court's equitable powers, but rather explicitly *preserves* such remedies.

Second, the passage describing the relief that may be awarded, "... such other action as may be necessary," 42 U.S.C. § 6972(a)(1)(B), is broad and open-ended. The citizen's suit provision indisputably confers the ability to award injunctive relief, an equitable remedy. *See Hecht*, 321 U.S. at 329. However, injunctions represent only one of the permissible forms of relief available in equity. Limiting the interpretation of this phrase to injunctive relief would be reading into the statute restrictions that do not exist. The statute does not limit the type of relief available, but instead specifically provides for authority to require responsible parties to take "other actions".

The Ninth Circuit's observation that KFC would be denied all right to recover its costs of remediation if RCRA is not construed to provide such relief, *KFC*, 49 F.3d at 524, is entitled to considerable weight. Petroleum and its fractions are unregulated under CERCLA and many state hazardous substance laws, including those of California and Louisiana. 42 U.S.C. § 9601(14); Cal.Health & Safety Code § 25317; La. R.S. 30:2271(4)(c). The hazardous waste in question in the present case was gasoline, a petroleum product, and therefore recovery may be difficult or impossible to obtain under CERCLA and analogous state laws.

Further, as the Ninth Circuit properly recognized, the tort remedies that are available to plaintiffs in KFC's position are largely inadequate, because of short statutes of limitation, difficulties of proof, and court delays. *KFC*, 49 F.3d at 523.

Moreover, negligence is nearly impossible to prove, given the historical standards for hazardous waste disposal, many of which are unsatisfactory according to modern disposal standards, and the difficulty of establishing the reasonableness of waste disposal methods decades in the past. Trespass and nuisance causes of action are useless in many or most of these cases because the hazardous waste was usually placed on the property by its owner at the time or by a person otherwise privileged to do so. As CERCLA does not apply to sites contaminated by hazardous waste comprised of petroleum or petroleum fractions, potentially including gasoline, regardless of the extent of the threat to human health or the environment posed thereby, such sites may be remediated only through RCRA. Thus, the need to encourage remediation of petroleum-derived hazardous waste through RCRA is particularly compelling.

As further noted by the Ninth Circuit, precluding recovery of remediation expenses under RCRA would deprive "the very citizens who most deserve the remedy, namely innocent citizens, like KFC," of the right to restitution of expenditures for compliance with the environmental laws with respect to environmental hazards that they did not create. *KFC*, 49 F.3d at 523. Instead, the persons who actually generated, transported, or disposed of the hazardous waste would be fully insulated from liability for their actions, and the entire cost of their actions would fall upon innocent parties. Restitution is available to prevent wrongdoers from shifting responsibility for the consequences of their actions onto innocent victims. *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 204, 88 S.Ct. 379, 387 (1967).

Equity demands fairness. Equity gives the courts the power to decide each case on its individual merits, and to avoid harsh results when broad and far-reaching rules of law are applied to a narrow set of facts. The manifest injustice caused by allowing the responsible party to escape liability while burdening the innocent party with all costs of remediation can be avoided by the reasonable application of the principles of equity to the specific facts of each RCRA case.

3. Reason Leads to the Logical Conclusion That Because the Equitable Defense of *Laches* Is Available, the Equitable Remedy of Restitution Must Also Be Available.

Petitioners argue that because RCRA contains no statute of limitations, it must not provide for a restitutionary remedy. The Ninth Circuit, however, recognized that *laches* would be available to limit the time within which a citizen could bring an action under RCRA. *KFC*, 49 F.3d at 522. Acknowledgment of the availability of the equitable defense necessarily requires acknowledgment of the availability of equitable remedies.

Laches is an equitable mechanism by which enforcement of a right is pretermitted wh[illegible] its exercise would unjustly cause injury to the defendant as a result of inexcusable delay or lack of diligence on the part of the person asserting the right. *Costello v. United States*, 305 U.S. 265, 282, 81 S.Ct. 534, 543 (1961); and 30A C.J.S. Equity §§ 129. Determining whether the doctrine of *laches* should bar a claim requires consideration of all of the circumstances of a particular case. *See Citizens and Landowners Against the Miles City/New Underwood Powerline v. Secretary, United States Department of Energy*, 683 F.2d 1171 (8th Cir. 1982); and *United States v. Reilly Tar and Chemical Co.*, 546 F.Supp. 1100 (D. Minn. 1982).

Petitioners contrast RCRA with CERCLA, in order to support their argument that only CERCLA provides for recovery of remediation costs. Petitioners' Brief at 23. CERCLA, unlike RCRA, expressly provides a statute of limitations for citizens' suits. Petitioners ignore the fact that CERCLA, as it was enacted in 1980, *also* lacked a specific statute of limitations with respect to recovery of remediation expenditures. For six years, CERCLA actions for cost reimbursement were not subject to a statute of limitations. Congress did not enact a statute of limitations for CERCLA until the Superfund Amendment and Reauthorization Act of 1986. Pub. L. No. 99-499, 100 Stat. 1613 (1986).

Several cases interpreting CERCLA as it existed prior to the 1986 amendment addressed the issue of whether a time limitation existed for cost recovery under CERCLA, and each

determined that the exercise of these rights was limited by *laches*. The court in *United States v. Mottolo*, 605 F.Supp. 898, 909 (D.N.H. 1985) held that, prior to its amendment, CERCLA contained no statute of limitations with respect to actions for recovery of remediation costs, but that the doctrine of *laches* would be applied instead because a cost reimbursement action under CERCLA is essentially equitable in nature. The court further held that the doctrine of *laches* does not apply to suits brought by a federal or state government in its sovereign capacity. *Id.* Thus, prior to the addition of a statute of limitations on cost recovery actions, there was *no* limit on the time within which a government could pursue cost recovery under CERCLA. *See also United States v. Dickerson*, 640 F.Supp. 448, 451 (D. Md. 1986) (adopting same); and *United States v. Conservation Chemical Company*, 619 F.Supp. 162, 213 (W.D. Mo. 1985). (adopting same).

Amicus respectfully asserts that the equitable defense of *laches* must be available under RCRA, as noted by the Ninth Circuit, *KFC*, 49 F.3d at 522. Amicus further asserts that, because the equitable defense is available to the benefit of defendants, the equitable right to restitution must be available to the plaintiff. The principles of equity do not permit advantage to accrue to either party to a dispute. *Bollinger*, 576 F.2d at 598. Equity must be equally available to all parties because "equity delights in doing justice completely, and not by halves." 27 AM. JUR. 2D Equity § 119; 30A C.J.S. Equity § 119. It would be unfair for the defendant to obtain the benefit of equitable defenses such as *laches* if plaintiffs are not similarly afforded the benefits of equity.

II. THE "IMMINENT AND SUBSTANTIAL ENDANGERMENT" MUST EXIST WHEN REMEDIATION IS INITIATED.

Petitioners interpret RCRA's authorization of citizens' suits for improper disposals of hazardous waste that "... may present an imminent and substantial endangerment" to require the danger to be imminent when suit is filed, rather than when remediation is commenced. This strained and restrictive interpretation ignores RCRA's express authorization of citizens' suits concerning past conduct, as well as the compelling public policy behind RCRA, as discussed *supra* at Section 1(A).

Petitioners' interpretation of RCRA would require abatement of an imminent endangerment to await, at a minimum, identification of the responsible parties, proper notice, and filing of suit. Meanwhile, the potential danger to public health and the environment would continue, and the harm threatened thereby might actually come to pass. As noted by the Eight Circuit in the context of the nearly identically-worded provision by which EPA can file suit with respect to an "imminent and substantial endangerment":

> We agree with the district court, however, that RCRA's "imminent and substantial endangerment" language does not require the EPA to file and prosecute its RCRA action *while* the endangerment exists. As the district court aptly noted, this would be an "absurd and unnecessary" requirement. The endangerment language is plainly intended by Congress to limit the reach of RCRA to sites where the potential for harm is great.... The purpose of [RCRA] is to 'give broad authority to the courts to grant all relief necessary to ensure complete protection of the public health and the environment' (citations omitted). The limitation urged by defendants [that the EPA must file suit under RCRA prior to undertaking remediation] would defeat this purpose.

United States v. Aceto Agricultural Chemicals Corp., 872 F.2d 1373, 1383 (8th Cir. 1989).

The absurdity of requiring private citizens to file suit prior to remediating hazardous waste sites is similarly apparent, as such a requirement would similarly defeat the compelling public policy behind RCRA, *i.e.*, the *immediate* remediation of imminent endangerment. The words "imminent endangerment" entail a real threat to human health or the environment, and the neutralization of such threats would be severely impeded if remediation were delayed by bureaucratic hurdles that are unnecessary under a reasonable reading of the statute.

Under Petitioners' interpretation of RCRA, those parties who act promptly to address dangerous contamination would be deprived of their remedy under RCRA, while the remedies of those who chose to do nothing, or to litigate rather than remediate, will be preserved. *See Bayless Investmt. & Trading Co. v. Chevron U.S.A.*, 39 E.R.C. (B.N.A.) 1428, 1432 (D.Ariz. 1994). The statute should be read to avoid such an inappropriate result. Petitioners' interpretation of the RCRA citizen's suit provision is neither the most natural reading nor the reading most conducive to fulfillment of RCRA's purpose, and therefore constitutes an impermissible curtailment of the relief available under RCRA.

III. RECOVERY OF REMEDIATION EXPENDITURES IS PROPER UNDER RCRA REGARDLESS OF THE APPLICABILITY OF CERCLA.

The Ninth Circuit stated in its opinion below that KFC "has no remedy under CERCLA because CERCLA's petroleum exclusion covers refined petroleum products such as gasoline and therefore bars a lawsuit to recover response costs occasioned by its release." *KFC*, 49 F.3d at 523 n.6. Petitioners and the Western States Petroleum Association ("WSPA") as Amicus Curiae, argue that recovery of remediation expenditures under RCRA is improper because permitting such relief would nullify CERCLA's petroleum exclusion. Petitioners' Brief at 25-26; Brief for the Western States Petroleum Association as Amicus Curiae in Support of Petitioners

at 17, *Meghrig v. KFC Western, Inc.*, __ U.S. __ (19__) (No. 95-83) ("WSPA Brief"). This argument is without merit.

RCRA and CERCLA were both enacted to address the problem of hazardous materials discharged into the environment, but they are independent statutory schemes. CERCLA does not preempt the field of remediation or recovery of remediation expenditures and CERCLA's applicability *vel non* is irrelevant to the existence of a cause of action under RCRA.

A. CERCLA Has Not Preempted the Fields of Remediation or Recovery of Remediation Expenditures.

This Honorable Court should not construe CERCLA's explicit provision for recovery of the costs of remediation from the parties ultimately responsible to preclude such recovery under RCRA. Admittedly, CERCLA is primarily a clean-up statute (it has been described as "overwhelmingly remedial" in nature, *U.S. v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373, 1380 (8th Cir. 1989)), while RCRA is primarily a regulatory statute (it has been described as a "prospective cradle-to-grave regulatory regime governing the movement of hazardous waste in our society," *Id.* at 1377). Nevertheless, in light of RCRA's authorization for private citizens to pursue civil actions, recovery of the costs of remediation of such hazardous waste from those ultimately responsible is also appropriate under RCRA.

CERCLA explicitly states that "[t]his chapter [CERCLA] does not affect or otherwise impair the rights of any person under Federal, State, or common law," with certain exceptions not relevant here. 42 U.S.C. § 9659(h). Thus, CERCLA does not provide the *sole* means of redress relative to matters regulated thereunder. Although CERCLA is "the centerpiece of the federal hazardous substance cleanup and liability program", S. COOKE, THE LAW OF HAZARDOUS WASTE § 12.01(2) (1995), it is not the *only* piece. CERCLA's existence in no way alters the availability of other remedies under other statutes, including RCRA, the common law, or equity.

B. *CERCLA and RCRA Are Independent Statutes Which Apply to Different Classes of Hazardous Materials.*

The terms "hazardous waste" and "hazardous substance", to which RCRA and CERCLA apply respectively, are not coextensive; a material can meet the definition of one without satisfying the definition of the other. A "hazardous substance" is defined under CERCLA to include any material defined as a "hazardous waste" under RCRA, except petroleum or a fraction thereof, or natural or synthetic gas. 42 U.S.C. § 9601(14). Thus, only RCRA, and not CERCLA, applies to hazardous waste consisting of petroleum or petroleum fractions, and the exclusion of CERCLA does not bar application of RCRA. *Agricultural Excess & Surplus Ins. Co. v. A.B.D. Tank & Pump Co.*, 878 F.Supp. 1091, 1097 (E.D. Ill. 1995); *Craig Lyle Ltd. Partnership v. Land O'Lakes, Inc.*, 877 F.Supp. 476, 480-81 (D. Minn. 1995); and *Zands v. Nelson*, 779 F.Supp. 1254, 1263 (S.D. Cal. 1991). It would be unconscionable, as well as contrary to the language of RCRA, to proscribe regulation of hazardous waste on the grounds that RCRA cannot apply because CERCLA's petroleum exclusion precludes regulation under CERCLA. Such an interpretation would free petroleum and its fractions, including benzene, toluene, and xylene, from all environmental regulation, despite the threat to human health and the environment that such materials may pose.

C. *RCRA Contains No Exclusion Comparable in Scope or Substance to the CERCLA Petroleum Exclusion.*

CERCLA applies exclusively to "hazardous substances", which are defined to exclude "petroleum, including crude oil or any fraction thereof which is not otherwise listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph." 42 U.S.C. § 9601(14). This exclusion is commonly referred to as the "petroleum exclusion".

The United States Environmental Protection Agency ("EPA") has interpreted the CERCLA petroleum exclusion to apply

to materials such as crude oil and crude oil fractions, hazardous substances indigenous to petroleum, such as benzene, and indigenous, refinery-added hazardous substances that are normally mixed with or added to crude oil or crude oil fractions during the refining process. EPA General Counsel, *Scope of CERCLA Petroleum Exclusion Under Sections 101(14) and 104(a)(2)* 5 (July 31, 1987). EPA has stated that the petroleum exclusion does not apply to hazardous substances that are added to oil during use. *Id.* at 4, citing 50 Fed. Reg. 13,456 (April 4, 1985) and 51 Fed. Reg. 8,206 (March 10, 1986). The courts have largely followed EPA's interpretation of the petroleum exclusion. *E.g., Wilshire Westwood Associates v. Atlantic Richfield Corp.*, 881 F.2d 801, 810 (9th Cir. 1989); and *Niecko v. EMRO Marketing Co.*, 769 F.Supp. 973, 982 (E.D. Mich. 1991).

The limited legislative history regarding the petroleum exclusion is comprised primarily of concerns expressed by members of Congress about the lack of authority under the bill to respond to releases of petroleum. James Baller, *The Petroleum Exclusion - Stronger Than Ever After* Wilshire Westwood, 43 SOUTHWESTERN L.J. 915, 918 (1990). Typical of these concerns are the comments of Representative Mikulski of Maryland:

> I realize that it is disappointing to see no oil-related provision in the bill, but we must also realize that this is our only chance to get hazardous waste dump site cleanup legislation enacted. I would note that we have had assurances from Members of the Senate that an oilspill proposal would be considered a very high legislative priority in the 97th Congress.
>
> Moreover, there is already a mechanism in place that is designed to deal with spills in navigable waterways. There is not, however, any provision currently in our law that addresses the potentially ruinous situations of abandoned toxic waste dump sites.
>
> I, therefore, believe that it is very imperative that we pass the Senate bill as a very

> important beginning in our attempt to defuse the ticking environmental time bomb of abandoned toxic waste sites.

126 Cong. Rec. H11,976 (Dec. 3, 1980). Thus, the CERCLA petroleum exclusion was enacted as a compromise measure to ensure the passage of a stopgap bill to begin the process of regulating hazardous substances in circumstances, such as the absence of a responsible party, to which RCRA did not apply at the time. RCRA's authorization for citizen suits with respect to imminent endangerments was added in 1984, Pub.L. No. 98-616 (1984), four years after CERCLA was enacted, Pub.L. No. 96-510 (1980).

RCRA also contains a "petroleum exclusion" of sorts, but it is far more limited in scope than CERCLA's petroleum exclusion. Congress temporarily exempted from regulation under RCRA all "drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil or natural gas", pending investigation by EPA as to whether regulation of these materials under RCRA was warranted. 42 U.S.C. § 6921(b)(2)(A), (B). This exemption is commonly referred to as the "Bentsen exemption." EPA eventually determined that regulation of these materials under RCRA was inappropriate, and the Bentsen exemption became a permanent part of RCRA.

The legislative history of the exemption indicates that it excludes from regulation only those wastes intimately associated with the exploration for and initial recovery of oil, and nothing more:

> The term "other wastes associated" is specifically included to designate waste materials intrinsically derived from primary field operations associated with the exploration, development, or production of crude oil, natural gas or geothermal energy. It would cover such substances as: Hydrocarbon bearing soil in and around related facilities; drill cuttings; and material (such as hydrocarbons,

> water, sand, and emulsion) produced from a well in conjunction with crude oil, natural gas or geothermal energy; and the accumulated material (such as hydrocarbons, water, sand, and emulsior) from production separators, fluid treating vessels, storage vessels, and production impoundments.
>
> The phrase "intrinsically derived from the primary field operations" is intended to differentiate exploration, development, and production operations from transportation (from the point of custody transfer or of production separation and dehydration) from manufacturing operations.

House Conf. Rep. No. 96-1444, Joint Explanatory Statement of the Committee of Conference, *reprinted in* 1980 U.S.C.C.A.N. 5019, 5031.

Subsequently, EPA expanded on the distinction between waste resulting from field operations and waste produced, stating that:

> wastes associated with such processes as oil refining and petrochemical-related manufacturing are not exempt because those processes are not an integral part of primary field operations.

EPA, EXECUTIVE SUMMARIES, REPORT TO CONGRESS: MANAGEMENT OF WASTES FROM THE EXPLORATION, DEVELOPMENT, AND PRODUCTION OF CRUDE OIL, NATURAL GAS, AND GEOTHERMAL ENERGY, Pt. 1, p. 7 n.1 (1987). Accordingly, the Bentsen exemption applies only to hazardous waste that is:

> associated with operations to locate or remove oil or gas from the ground or to remove impurities from such substances, and it must be intrinsic to and uniquely associated with oil and gas exploration, development or production operations (commonly referred to simply as exploration and

> production or E&P); the waste must not be generated by transportation or manufacturing operations.

EPA, *Clarification of the Regulatory Determination for Wastes from the Exploration Development and Production of Crude Oil, Natural Gas and Geothermal Energy*, 58 Fed. Reg. 15,284 (March 22, 1993).

Thus, the RCRA Bentsen exemption does not create a blanket exemption of all petroleum-related substances from RCRA's ambit. Rather, it is a narrow exemption, the purpose of which is merely to except from RCRA hazardous waste produced by oil and gas exploration and production activities.

The court of appeals below did not even discuss whether the leaded gasoline discharged onto the property falls within the Bentsen exemption, and the foregoing discussion of EPA's interpretation of the exemption renders it apparent that the exemption *does not* apply to leaded gasoline, a refined petroleum product that is well-removed from exploration and production activities.

The scope of the CERCLA petroleum exclusion is much more broad than that of the RCRA Bentsen exemption, in that it applies to all petroleum fractions, rather than merely to substances used for oil and gas exploration and development. Moreover, according to its plain meaning, as well as its interpretation by Congress and EPA, the Bentsen exemption does not encompass refined petroleum products, such as the leaded gasoline at issue in the present case, regardless of whether such products fall within the CERCLA petroleum exclusion.

D. Leaking Underground Gasoline Storage Tanks Are Regulated Pursuant to RCRA.

When Congress addressed the problem of leaking underground gasoline storage tanks in 1984, it did so not by amending CERCLA and its petroleum exclusion, but by amending RCRA explicitly to permit regulation of leaking USTs. 42 U.S.C. § 6991, *et seq.* ("Subtitle I"). *See* Robert N. Aguilez, *Refining*

CERCLA's Petroleum Exclusion, 7 TULANE ENV. L.J. 41, 64 (1993), citing *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 667 (5th Cir. 1989). Thus, Congress has clearly indicated its willingness to regulate disposal of petroleum-derived substances through RCRA, regardless of the exclusion of these substances from CERCLA's regulatory scheme.

WSPA raises two issues with respect to USTs. First, WSPA implies that citizens cannot file suit under RCRA with respect to leakage of gasoline from USTs because gasoline is not "waste" within the meaning of RCRA. WSPA Brief at 11, citing 130 Cong. Rec. S2028, S2080 (daily ed., Feb. 29, 1984) (comments of Sen. Durenberger). Most courts that have examined the issue, however, have held that *leaked* gasoline *is* a waste material. *Agricultural Excess*, 878 F.Supp. at 1095; *Craig Lyle*, 877 F.Supp. at 482; and *Zands*, 779 F.Supp. at 1262. *C.f.*, *Winston v. Shell Oil*, 861 F.Supp. 713, 716 (C.D.Ill. 1984).

WSPA also notes that Subtitle I contains no cost recovery mechanism. WSPA Brief at 11. This point is irrelevant because Subtitle I is part of RCRA, and RCRA's citizen suit provision authorizes suit for any "imminent and substantial endangerment", as discussed *supra* at section I(A), including threats caused by violation of Subtitle I. 42 U.S.C. § 6972(a)(1)(B).

Accordingly, by providing for the regulation of USTs under Subtitle I of RCRA, Congress has clearly indicated that the CERCLA petroleum exclusion does not preclude regulation under RCRA of gasoline that has leaked from USTs, when an imminent endangerment to human health and the environment is presented thereby.

CONCLUSION

For the foregoing reasons, Amicus respectfully urges this Honorable Court to affirm the decision of the United States Court of Appeals for the Ninth Circuit recognizing that, under proper circumstances, the RCRA citizen's suit provision authorizes courts to order a party responsible for the disposal of hazardous waste which creates an imminent and substantial endangerment to health and the environment to repay an innocent party who has remediated the contamination in question.

Respectfully submitted:

Lawrence A. Durant
General Counsel
Counsel of Record
James M. Bookter
Senior Attorney
Office of General Counsel
Louisiana Department of
Transportation and
Development
P.O. Box 94245
Baton Rouge, Louisiana 70000
(504) 379-1207

Charley Hutchens
Suite 105
412 West University
Lafayette, Louisiana 70506
(318) 237-4102
Special Counsel

William M. Hudson, III
Edgar D. Gankendorff
Robert A. Mahtook, Jr.
Victoria A. Guidry
Lawrence E. Marino
OATS & HUDSON
Suite 400
Gordon Square
100 East Vermilion Street
Lafayette, Louisiana 70501
(318) 233-1100
Special Counsel

Counsel for Amicus Curiae
State of Louisiana
Through Its Department of
Transportation and
Development

December 8, 1995

MOTION FILED
JAN 16 1996

No. 95-83

In The

Supreme Court of the United States

October Term, 1995

Alan Meghrig and Margaret Meghrig,
Petitioners,

vs.

KFC Western, Inc.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE BI-STATE DEVELOPMENT AGENCY OF THE MISSOURI-ILLINOIS METROPOLITAN DISTRICT AS *AMICUS CURIAE* SUPPORTING RESPONDENT

John Fox Arnold
Counsel of Record
Nelson G. Wolff
Lashly & Baer, P.C.
714 Locust Street
St. Louis, Missouri 63101
(314) 621-2939

Timothy W. Burns
901 East Broadway, Suite 100
Columbia, Missouri 65201
(314) 443-3141

Jerome M. Organ
School of Law,
University of Missouri-Columbia
Columbia, Missouri 65211
(314) 882-2825

Counsel for Amicus Curiae The Bi-State Development Agency of The Missouri-Illinois Metropolitan District

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	6
The District Courts Are Empowered To Award Restitution Under RCRA's Citizen Suit Provision Because Congress Did Not Clearly And Unmistakably Limit The Broad Equitable Jurisdiction Of The District Courts And The Remedy Of Restitution Promotes RCRA's Statutory Purposes	6
A. The District Courts Are Empowered To Grant All Traditional Equitable Remedies, Including Restitution, Because RCRA'S Citizen Suit Provision Invokes The Broad Equitable Jurisdiction Of The District Courts Without Clearly And Unmistakably Limiting That Jurisdiction.	6
B. The District Courts Properly May Grant Restitution Because That Remedy Furthers RCRA's Dual Statutory Purposes Of Promoting Prompt Remediation Of Contamination And Assuring The Party Responsible For The Contamination Incurs The Costs Of Remediation.	13
CONCLUSION	18

TABLE OF AUTHORITIES

Page(s)

CASES:

Amoco Prod. Co. v. Gambell, 480 U.S. 531 (1987) 11

Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) 9

Barket, Levy & Fine v. St. Louis Thermal Energy, 948 F.2d 1084 (8th Cir. 1991) 2

Califano v. Yamasaki, 442 U.S. 682 (1979) 11

California v. American Stores Co., 495 U.S. 271 (1990) 10,11,12

Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986). 6

Delmuth v. Muth, 491 U.S. 223 (1989) 9,13

FTC v. Southwest Sunsites, Inc., 665 F.2d 711 (5th Cir.), *ert. denied*, 456 U.S. 973 (1982) 11

Glidden Co. v. Zdanok, 370 U.S. 530 (1962) 8

Gregory v. Ashcroft, 501 U.S. 452 (1991) 9

Hecht Co. v. Bowles, 321 U.S. 321 (1944) 10,11,14

Lauf v. E.G. Shinner & Co., 303 U.S. 323, 329 (1938) 8

Lessee of Livingston v. Moore, 32 U.S. (7 Pet.) 469 (1833) 7

Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960) 11,13

Pierce v. Amaral, 928 F.2d 94 (8th Cir. 1991) 11

Porter v. Warner Holding Co., 328 U.S. 395 (1946) ..... *passim*

Reebok Int'l, Ltd. v. Marnatech Enters, 970 F.2d 552 (9th Cir. 1992) 11

Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1 (1974) 11

SEC v. First City Fin. Corp., 890 F.2d 1215 (D.C. Cir. 1989) 11

United States v. Moore, 340 U.S. 616 (1951) 11

United States v. Rodgers, 461 U.S. 677 (1983) 11

Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) .. 11,12

Statutes and rule:

Comprehensive Environmental Response Compensation and Liability Act (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767 (1980) 14

Emergency Price Control Act of 1942, Ch. 26, § 205(a), 56 Stat. 33 9

Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3224 (1984) (HSWA) 14

Ill.Rev.Stat. ch. 127 (1989) 1

Mo.Rev.Stat. § 70.370 (1994) 1

Mo.Rev. Stat. § 70.373 (1994) 2

Pub. L. No. 98-616, Tit. II, § 206, 98 Stat. 3239 (1984) (codified at 42 U.S.C. §6924(u)(1988)) 15

Pub. L. No. 98-616, Tit. II, § 233, 98 Stat. 3257-58 (1984) (codified at 42 U.S.C. §6923(h)(1988)) 15

Pub. L. No. 98-616, Tit. IV, § 401, 98 Stat. 3268 (1984)(codified at 42 U.S.C. §6972(a)) 15

Pub. L. No. 98-616, Tit. VI, § 601, 98 Stat. 3277-3288 (1984) (codified as amended at 42 U.S.C. §§ 6991 6991(i)(1988)) 15

Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.* ..... *passim*

42 U.S.C. § 6902 14

42 U.S.C. § 6972 3,4,12

Resource Conservation and Recovery Act of 1976 (RCRA) Pub. L. No. 94-580, 90 Stat. 2795 (1976) 14

Supreme Court Rule 37.5 2

U.S. Const. art. III 6,8

MISCELLANEOUS:

Cass R. Sunstein, *Interpreting Statutes in the Regulatory tate*, 103 Harv. L. Rev. 405 (1989) 8

The Federalist No. 80 (Alexander Hamilton) (Gary Wills ed. 1982) 7

Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 Harv. L. Rev. 1959 (1994) 8

S.Rep. No. 848, 96th Cong., 2d Sess.33 (1980) 14

William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593 (1992) 8

William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. Pa. L. Rev. 1007 (1989) 8

No. 95-83

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ALAN MEGHRIG and MARGARET MEGHRIG,
Petitioners,

vs.

KFC WESTERN, INC.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE BI-STATE DEVELOPMENT AGENCY OF THE MISSOURI-ILLINOIS METROPOLITAN DISTRICT AS *AMICUS CURIAE* SUPPORTING RESPONDENT

INTEREST OF THE AMICUS CURIAE

Amicus Curiae, the Bi-State Development Agency of the Missouri-Illinois Metropolitan District ("Bi-State"), is a body corporate and politic organized pursuant to a compact between Missouri and Illinois.[1] Mo.Rev.Stat. § 70.370 (1994); Ill.Rev.Stat.

[1] Although Bi-State has been designated as a body politic pursuant to its states' enabling legislation, the United States Court of Appeals for the Eighth

(Footnote 1 continued on next page)

ch. 127, ¶ 63 r-1 (1989) (identical compact provisions). The compact creates a single interstate agency to coordinate regional planning and development of the Bi-State Metropolitan Development District (the "district"). The district is comprised of the geographical areas of the City of St. Louis, Missouri, the Missouri counties of St. Louis, St. Charles, and Jefferson, and the Illinois counties of Madison, St. Clair, and Monroe. Mo.Rev.Stat. § 70.370, art. II.

Bi-State has a significant measure of autonomy, including all necessary and appropriate powers to develop the district, and is funded by farebox receipts, sales tax revenues from its service area and from federal grants. *Id.* § 70.370, art. VI. Bi-State can buy and sell land, facilities, and equipment, borrow money, issue bonds, condemn property, enter into contracts on its own behalf, and sue and be sued on its contracts. *Id.* § 70.373; Ill.Rev.Stat. ch. 127, ¶ 63 s-9. Bi-State coordinates the district's streets, highways, parkways, parking areas, terminals, water supply and sewage and disposal works, recreational and conservation facilities and projects, and land use pattern. Mo.Rev.Stat. § 70.370 art. III (2).

The primary mission of Bi-State is to provide public mass transportation in the St. Louis Metropolitan area. Currently, Bi-State operates bus transportation and the MetroLink light rail system within its district. In addition to owning facilities to house mass transportation operations, Bi-State has acquired significant numbers of parcels of property and rights-of-way to

---

(Footnote 1 continued)

Circuit has declared Bi-State to be more like a local government entity than an arm of the compacting states. *Barket, Levy & Fine v. St. Louis Thermal Energy*, 948 F.2d 1084, 1088 (8th Cir. 1991). In that Bi-State may not be considered a political subdivision of a state under Supreme Court Rule 37.5, Bi-State has obtained, and filed separately with the court, written consent from both parties .

construct MetroLink stations and to operate the system currently on line. Extensions of MetroLink have been planned and are in the early stages of implementation. To implement these plans of expansion and to further Bi-State's mission to provide cost and energy efficient mass transportation, it will be necessary for Bi-State to acquire, own and operate significantly more property in the future.

Much of the property acquired by Bi-State to date has been taken by exercise of its power of eminent domain. Many parcels acquired have contained environmental hazards, including underground storage tanks, hydrocarbon contamination, asbestos, and polychlorinated biphenyls (PCBs). In each instance, Bi-State has in no way contributed to the contamination of the parcels and is an innocent land owner. With respect to many of the parcels, Bi-State had no choice in deciding whether to acquire the property, as it lay along a right-of-way selected by a metropolitan planning agency in accordance with federal law. Bi-State has been compelled to clean up the property, after it was acquired, to render it fit for its intended use as a MetroLink station or rail line. Fundamental unfairness would result if Bi-State and the taxpayers of its service communities were forced to incur the cost of cleaning property contaminated by previous owners and operators who, in many instances, benefitted from the property by operating business enterprises for profit.

In sum, Bi-State believes that the United States Court of Appeals for the Ninth Circuit properly interpreted the citizens suit provision of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a) in the instant case. RCRA's citizen suit provision invokes the equitable jurisdiction of the district courts to grant all traditional equitable remedies, including restitution. RCRA does not clearly and unmistakably limit that jurisdiction. Bi-State supports the position of respondent that RCRA authorizes the district courts to award private parties restitution of cleanup costs and that RCRA's limitation to sites

that pose "imminent and substantial endangerment" does not bar restitution of costs of cleaning up contamination that posed a threat in the past.

SUMMARY OF ARGUMENT

The district courts' traditional equitable powers are indispensable to the independence of the Judiciary and to the maintenance of our tripartite system of government. Although Congress may limit the district courts' equitable powers, decisions of this Court make clear that once Congress invokes the district courts' equitable jurisdiction, Congress may not limit that jurisdiction unless it unequivocally expresses its intent to do so. This Court requires Congress to state its intent to limit the district courts' equitable juri sdiction clearly and unmistakably to prevent the aggrandizement of Congress at the expense of the courts. Garbled whispers by Congress in a statute's legislative history definitely should not displace rules refined over centuries by a co-equal branch of government acting in its area of expertise.

In enacting the citizen suit provision of RCRA , 42 U.S.C. § 6972(a)(1)(B), Congress invoked the district courts' equitable jurisdiction without clearly and unmistakably limiting the scope of that jurisdiction. As a result, RCRA's citizen suit provision empowers the district courts to exercise all their traditional equitable powers. Those traditional equitable powers include the power to grant restitution. Granting a landowner restitution from the prior owner who caused the contamination of the property furthers two of Congress' policy goals under RCRA, namely, promoting prompt remediation of contamination and

assuring that the party responsible for the contamination incurs the costs of remediation.[2]

---

[2] Although this amicus brief does not discuss how the "imminent and substantial endangerment" clause of RCRA's citizen suit provision should be interpreted, Amicus Bi-State agrees with, and joins in, the arguments presented in the Brief of Amici Curiae Massachusetts, Missouri, etc., that construing the "imminent and substantial endangerment" clause to preclude parties who have incurred costs of remediation prior to filing a RCRA citizen suit from pursuing restitution under RCRA's citizen suit provision would be inconsistent with Congress' invocation of the district courts' equitable jurisdiction and would be inconsistent with Congress' policy concern of promoting prompt remediation. Moreover, Amicus Bi-State believes that regardless of how this Court interprets the "imminent and substantial endangerment" clause, this Court should decide the extent of the district courts' equitable jurisdiction under RCRA's citizen suit provision so that parties faced with decisions regarding the appropriate means of addressing contamination that "may present an imminent and substantial endangerment" can conduct their affairs with a clear understanding of their rights under RCRA's citizen suit provision.

ARGUMENT

The District Courts Are Empowered To Award Restitution Under RCRA's Citizen Suit Provision Because Congress Did Not Clearly And Unmistakably Limit The Broad Equitable Jurisdiition Of The District Courts And The Remedy Of Restitution Promotes RCRA's Statutory Purposes.

A. The District Courts Are Empowered To Grant All Traditional Equitable Remedies, Including Restitution, Because RCRA's Citizen Suit Provision Invokes The Broad Equitable Jurisdiction Of The District Courts Without Clearly And Unmistakably Limiting That Jurisdiction.

1. Our government is one of separated powers, with an independent Judiciary to check the excesses of the other branches and to protect individual rights. *See, e.g., Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986). From the very inception of our Republic, the drafters of the Constitution viewed equitable jurisdiction as playing an indispensable role in securing the independence of the Judiciary and, consequently, in maintaining separation of governmental powers. Thus, our Constitution extends "[t]he judicial Power ... to all Cases, in Law and *Equity*, arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority ...." U.S. Const. art. III, § 2, cl. 1 (emphasis added). Alexander Hamilton thought equitable jurisdiction of such importance to the Judiciary that he expounded on its necessity:

> It has also been asked, what need of the word "equity"? What equitable causes can grow out of the constitution and laws of the United States? There is hardly a subject of litigation between individuals, which may not involve those ingredients of *fraud, accident, trust* or *hardship*,

> which would render the matter an object of equitable, rather than of legal jurisdiction, as the distinction is known and established in several of the states.

The Federalist No. 80 at 406-07 (Alexander Hamilton) (Gary Wills ed. 1982).

The early decisions of this Court also recognize the role equity plays in maintaining the separation of powers and in securing an independent Judiciary. A century and a half ago, Justice Johnson spoke of the indispensability of that jurisdiction to the exercise of judicial power:

> For, as an essential branch or exercise of judicial power, [equitable jurisdiction] is acknowledged to exist everywhere; nor is it possible for any one acquainted with its nature and character, and the remedies it affords for the assertion of rights or the punishment of wrongs, to doubt that the power to exercise it, and the means of exercising it, must exist somewhere; or the administration of justice will be embarrassed, if not incomplete.

Lessee of Livingston v. Moore, 32 U.S. (7 Pet.) 469, 547 (1833).

Recognizing judicial power is incomplete without equitable jurisdiction, this Court concluded that, in sovereignties in which the judiciary lacks the full range of equitable jurisdiction, the separation of governmental powers is less than perfect:

> The natural distribution and the necessary distribution to individual security, is into legislative, executive and judicial; but it is obvious, that every community may make a perfect or imperfect separation and distribution of these powers, at its will. It has pleased Pennsylvania, in her constitution, to make what most jurists would pronounce an imperfect separation of those powers; she has not thought it necessary to make any imperative provision for incorporating the equity jurisdiction, in its full latitude, into her jurisprudence. . . .

Id. at 546-47.

2. Equity, though vital to the Judiciary and separation of powers, is not unchecked. As is appropriate in a democracy, our Constitution has relegated to Congress the ultimate say in what remedies, including equitable ones, the lower federal courts may grant. U.S. Const. art. III, § 1; *Glidden Co. v. Zdanok*, 370 U.S. 530, 557 (1962) (holding it consistent with Article III for Congress to limit the remedial powers of a federal court to the award of money damages); *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 329 (1938) (holding that Congress has the power to preclude the district courts from issuing injunctions in the absence of specific findings).

Congress' ultimate control over the lower federal courts' equitable powers, of course, does not make those equitable powers, or the separation-of-powers structure that they promote, unworthy of protection. It just makes those powers and that structure hard to protect. This Court, however, has been vigilant in protecting such fundamental structures of our Constitution in the face of Congress' express constitutional authority to alter them.

A vital weapon in this Court's arsenal for safeguarding hard-to-protect constitutional structures has been the clear (or "plain") statement rule.[3] Thus, to protect "the fundamental constitutional balance between the Federal Government and the States," in the face of Congress' express constitutional power to abrogate the

[3] A small body of academic literature discusses clear statement rules. *See generally* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. Pa. L. Rev. 1007 (1989); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593 (1992); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405 (1989); Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 Harv. L. Rev. 1959 (1994).

States' Eleventh Amendment immunity, this Court held "that Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238, 242 (1985). And, again, in *Delmuth v. Muth*, 491 U.S. 223, 227-28 (1989), this Court applied that "simple but stringent" clear statement test "[t]o temper congress' acknowledged powers of abrogation with due concern for the Eleventh Amendment's role as an essential component of our constitutional structure." Similarly, in *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991), this Court applied a clear ("plain") statement rule to protect the internal operations of a state government from Congress' constitutional authority to enact laws affecting those internal operations. Significantly, this Court stated in *Ashcroft* that the structure of state sovereignty in a federal system and separation of powers are of comparable value to our Republic. *Id.* at 458.

To protect separation of powers, this Court has enunciated a similar clear statement rule with respect to limitations on the traditional range of the district courts' equitable powers. In *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946), this Court addressed the remedies available to district courts under the Emergency Price Control Act of 1942, ch. 26, § 205(a), 56 Stat. 33 (the "Price Control Act") and, in doing so, created a clear statement rule for determining the scope of relief afforded by statutes that allow resort to the district courts' equitable jurisdiction.

The Price Control Act's enforcement provision, Section 205(a), like RCRA's citizen suit provision, explicitly empowered the district courts to enforce compliance with and to enjoin past and future violations of the Act. *Id.* at 397. Like RCRA's citizen suit provision, Section 205(a) also empowered the district courts to issue "other orders" but did not specify that the term "other orders" encompassed restitution. *Id.* Nevertheless, this Court

held that the Price Control Act empowered the district courts to grant restitution. *Id.* at 402.

Acknowledging the district courts' jurisdiction under the Price Control Act "to enjoin" and "to enforce" is an equitable jurisdiction, this Court expounded on the usual scope of equitable jurisdiction.

> Power is thereby resident in the District Court, in exercising this jurisdiction, "to do equity and to mould each decree to the necessities of the particular case." *Hecht Co. v. Bowles*, 321 U.S. 321, 329. It may act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest; if necessary, persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced. In addition, the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice.

Porter, 328 U.S. at 398. The Court then addressed Congress' power to limit the scope of the district courts' equitable jurisdiction:

> [T]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

Id.

This Court has reaffirmed this clear statement rule on eight subsequent occasions. *See California v. American Stores Co.*,

495 U.S. 271, 295 (1990); *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542-46 (1987); *United States v. Rodgers*, 461 U.S. 677, 708 (1983); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982); *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979); *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 19-20 (1974); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 290-91 (1960); *United States v. Moore*, 340 U.S. 616, 619 (1951). *See also Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944) (holding "if Congress desired to make ... an abrupt departure from traditional equity practice ... it would have made its desire plain").

Notably, on two of those occasions, this Court specifically held that even when Congress simply granted the district courts power to issue injunctions, the statute under consideration also empowered the district courts to grant restitution. *Moore*, 340 U.S. at 619-20; *Mitchell*, 361 U.S. at 296.

This Court and the lower federal courts have applied the *Porter* clear statement rule in numerous regulatory settings. *See, e.g., American Stores*, 495 U.S. 271 (interpreting Clayton Act); *Amoco*, 480 U.S. 531 (interpreting Alaska National Interest Lands Conservation Act); *Weinberger*, 456 U.S. 305 (interpreting Federal Water Pollution Control Act); *Yamasaki*, 442 U.S. 682 (interpreting Social Security Act); *Bannercraft Clothing*, 415 U.S. 1 (interpreting Freedom of Information Act); *Mitchell*, 361 U.S. 288 (interpreting Fair Labor Standards Act of 1938); *Moore*, 340 U.S. 616 (interpreting Housing and Rent Act of 1947); *Porter*, 328 U.S. 395 (interpreting Emergency Price Control Act of 1942); *Reebok Int'l, Ltd. v. Marnatech Enters.*, 970 F.2d 552, 561-62 (9th Cir. 1992) (interpreting Lanham Act); *Pierce v. Amaral*, 928 F.2d 94, 96 (8th Cir. 1991) (interpreting Interstate Land Sales Full Disclosure Act); *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989) (interpreting Securities Exchange Act of 1934); *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 718-19 (5th Cir.) (interpreting Federal Trade Commission Act), *cert. denied*, 456 U.S. 973 (1982).

The *Porter* clear statement rule thus has become an integral fibre in the cloth of our regulatory law.

3. In enacting RCRA's citizen suit provision, Congress specifically invoked the district courts' equitable jurisdiction when it granted them the power to "restrain".[4] Congress did not stop there, however; Congress also provided that the district courts may "order such person to take such other action as may be necessary." This Court twice has stated that Congress is well aware of the existence of the principles encapsulated in the *Porter* rule. *American Stores*, 495 U.S. at 295; *Weinberger*, 456 U.S. at 313. In RCRA's citizen suit provision, however, Congress did *not* make clear any intent it may have had to limit the district courts' equitable jurisdiction. RCRA's citizen suit provision is devoid of preclusive language. In light of *Porter*,

---

[4] RCRA's citizen suit provision, 42 U.S.C. § 6972(a) provides, in pertinent part, that:

> Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf—
>
> (1)(A). . . .
>
> (B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment;
>
> . . .
>
> . . . The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, ... to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both. . . .

Congress' inclusion in RCRA's citizen suit provision of language invoking the district courts' equitable jurisdiction without expressly limiting the scope of that jurisdiction evinces an unambiguous intent to make the traditional equitable remedies, including restitution, available to district courts addressing RCRA citizen suits.

This Court may find isolated statements in RCRA's legislative history suggesting that the district courts somehow are precluded from granting relief other than an injunction. Such isolated statements are "beside the point." *Delmuth*, 491 U.S. at 230. As this Court held in *Delmuth*, to satisfy a clear statement rule "evidence of congressional intent must be both unequivocal and *textual*." *Id.* (emphasis added). "If Congress' intention is 'unmistakably clear in the language of the statute,' recourse to legislative history will be unnecessary; if Congress' intention is not unmistakably clear, recourse to legislative history will be futile, because by definition [a clear statement rule] will not be met." *Id.*

B. The District Courts Properly May Grant Restitution Because That Remedy Furthers RCRA's Dual Statutory Purposes Of Promoting Prompt Remediation Of Contamination And Assuring The Party Responsible For The Contamination Incurs The Costs Of Remediation.

1. As discussed above, by failing to state clearly and unmistakably in RCRA's citizen suit provision that the district courts are precluded from granting restitution, Congress left the Judiciary free to exercise its traditional equitable power to grant such relief. Before the district courts can grant restitution under a regulatory statute, however, this Court also requires that restitution further the purposes of the statute. *See Mitchell*, 361 U.S. at 291-92 ("When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enact-

ment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes); *Porter*, 328 U.S. at 400 (holding that, in fashioning equitable remedies under the Emergency Price Control Act, the district courts "must act primarily to effectuate the policy of the Emergency Price Control Act"); *Hecht*, 321 U.S. at 331 (holding that the district court's equitable discretion to withhold or grant injunctive relief under a regulatory statute must be exercised in light of the large objectives of that statute).

Restitution does further RCRA's purposes. Indeed, restitution presents the best option of furthering RCRA's purposes when, as in this case, the government seeks to have a subsequent property owner remediate the contamination caused by others.

2. Congress enacted the Resource Conservation and Recovery Act of 1976 (RCRA), Pub. L. No. 94-580, 90 Stat. 2795 (1976), as an amendment to the Solid Waste Disposal Act. 42 U.S.C. §§ 6901-6992k (1988). RCRA initially had a prospective focus. Congress designed RCRA to encourage parties to minimize waste production and to require parties handling solid and hazardous wastes to observe appropriate management practices so that environmental contamination resulting from waste handling and disposal would be minimized. 42 U.S.C. § 6902 (1988).

Congress first focused on the need to address retroactively the problems of facilities contaminated as a result of past treatment or disposal of hazardous substances in 1980, when Congress enacted the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767 (1980), creating a retroactive, strict liability regime designed to promote prompt remediation and to assure that the "polluter pays." S.Rep. No. 848, 96th Cong., 2d Sess. 33 (1980).

By the time Congress enacted the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3224 (1984)

(HSWA), however, Congress apparently had realized that CERCLA would not succeed in promoting the prompt remediation of present and historical contamination problems associated with (1) all facilities engaged in the treatment, storage or disposal of hazardous waste, and (2) the improper management of petroleum underground storage tanks systems, as Congress specifically addressed these two problems in HSWA. With respect to contamination problems at treatment, storage and disposal facilities, Congress included in HSWA provisions authorizing the EPA to require "corrective action" at such facilities. Pub. L. No. 98-616, Tit. II, § 206, 98 Stat. 3239 (1984) (codified at 42 U.S.C. § 6924(u)(1988)) (requiring as a permit condition "corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage or disposal facility") and Pub. L. No. 98-616, Tit. II, § 233, 98 Stat. 3257-58 (1984) (codified at 42 U.S.C. § 6923(h)(1988)) (authorizing issuance of corrective action orders when "there is or has been a release of hazardous waste into the environment" from an interim status facility). With respect to preventing and remediating contamination problems associated with leaking petroleum underground storage tank systems, Congress included in HSWA an entirely new subchapter outlining management and remediation procedures associated with petroleum underground storage tank systems. Pub. L. No. 98-616, Tit. VI, § 601, 98 Stat. 3277-3288 (1984) (codified as amended at 42 U.S.C. §§ 6991-6991(i)(1988)).

At the same time that it enacted these new provisions designed to assure that parties responsible for environmental contamination promptly clean up such contamination, Congress also amended RCRA's citizen suit provision, by adding section 6972(a)(1)(B). Pub. L. No. 98-616, Tit. IV, § 401, 98 Stat. 3268 (1984)(codified at 42 U.S.C. § 6972(a) (1988)).

Through these provisions, Congress added to RCRA's prospective management focus a retroactive remedial focus that encompasses CERCLA's environmental policy goals of promoting prompt remediation of environmental contamination

and of assuring that the parties responsible for the contamination incur the costs associated with remediating the contamination.

3. When a state seeks to compel an innocent current property owner to remediate contamination resulting from the activities of a former property owner, Congress can be sure that both of its policy goals - the prompt cleanup of contamination and the shifting of costs to the culpable party - will be advanced only if district courts have the power to grant restitution to the current property owner who promptly cleans up the contamination. To understand why the availability of restitution plays a key role in facilitating Congress' dual policy goals, one simply needs to evaluate the options available to an innocent current property owner faced with a state cleanup order.

If restitution is not available under RCRA's citizen suit provision, when a state orders an innocent current property owner to remedy contamination caused by a former property owner, the current property owner has almost no incentive to remediate the contamination promptly because it has no guarantee that it can recover its costs. Rather, the current property owner has every incentive to contravene one of Congress' goals - prompt remediation - to facilitate Congress' other goal - the imposition of costs on culpable parties. Instead of promptly remediating the property and incurring the associated costs of remediation, the current property owner has every incentive, including the availability of attorneys fees, to delay remediation while pursuing a citizen suit action under RCRA directed toward obtaining an order that will force the former owner and/or operator to remediate the contamination and thereby incur the costs of remediation directly. The existence of possible independent state common law claims for damages, such as misrepresentation and breach of warranty, are unlikely to provide any significant incentive for the current property owner promptly to incur the costs of remediation given the uncertainty of recovery under such fact-dependent causes of action, particularly given

potential statute of limitations problems, and because the current owner will have to absorb all transaction costs associated with the litigation

Accordingly, if district courts do not have the authority to grant restitution under RCRA's citizen suit provision, current property owners nonetheless will make use of RCRA's citizen suit provision, but will do so in a way that promotes only one of Congress' policy goals, shifting the cost of remediation to culpable parties, at the expense of Congress' other policy goal, assuring prompt remediation. By contrast, if restitution is available under RCRA's citizen suit provision, when a state orders an innocent current property owner to remediate the property, the innocent current property owner has an incentive to remediate promptly because it can be confident that it can shift the costs of remediation to the culpable party and seek the recovery of attorneys' fees. Consequently, the availability of restitution is essential to satisfying Congress' policy goals of prompt remediation and assuring that the parties responsible for the contamination incur the costs of remediation..

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

December 7, 1995

Respectfully submitted,

JOHN FOX ARNOLD
Counsel of Record

NELSON G. WOLFF
Lashly & Baer, P.C.
714 Locust Street
St. Louis, Missouri 63101
(314) 621-2939

TIMOTHY W. BURNS
901 East Broadway, Suite 100
Columbia, MO 65201
(314) 443-3141

JEROME M. ORGAN
School of Law,
University of Missouri-Columbia
Columbia, Missouri 65211
(314) 882-2825

Counsel for Amicus Curiae The Bi-State Development Agency of The Missouri-Illinois Metropolitan District

Supreme Court, U.S.
FILED
NOV 9 1995
CLERK

(12)

No. 95-83

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

Alan Meghrig
and Margaret Meghrig,
Petitioners

vs.

KFC Western, Inc.,
Respondent

AMICUS CURIAE BRIEF OF SOUTHERN CALIFORNIA SERVICE STATION ASSOCIATION IN SUPPORT OF PETITIONERS

Dimitri G. Daskalopoulos
3 Church Circle
Suite 500
Annapolis, MD. 21401
(301) 261-8480
Counsel of Record
for Amicus Curiae

36 pp

QUESTIONS PRESENTED

1. Whether the citizen suit provision of RCRA, 42 U.S.C. 6972 (a)(1)(B), which authorizes district courts to restrain persons who have contributed to contamination or to 'order such persons to take such other action as may be necessary", also authorizes a private party suit for reimbursement of clean up costs, despite the absence in RCRA, unlike CERCLA and other statutes, of any express language authorizing such an action.

2. Whether the citizen suit provision of RCRA, 42 U.S.C. 6972 (a)(1)(B), which only permits suits against persons who have contributed to the generation, transport or disposal of solid or hazardous waste "which may present an imminent and substantial endangerment to health or the environment" authorizes a citizen suit for contamination that was fully remediated at least 3 years before the action was commenced.

TABLE OF CONTENTS

QUESTIONS PRESENTED I

TABLE OF CONTENTS II

TABLE OF AUTHORITIES..... III

STATEMENT OF THE CASE..... 1

INTRODUCTION AND INTEREST OF AMICUS 1

ARGUMENT 11

I. THE 9th CIRCUIT DECISION IS BASED UPON ERRONEOUS ASSUMPTIONS 12

II. THE PLAIN LANGUAGE OF THE STATUTE DOES NOT AUTHORIZE THE CAUSE OF ACTION CREATED BY THE 9th CIRCUIT 15

III. THE LEGISLATIVE HISTORY DOES NOT SUPPORT CREATION OF AN IMPLIED CAUSE OF ACTION ... 20

IV. IF SUCH A CAUSE OF ACTION EXISTS IT IS LIMITED TO CASES PRESENTING AN "IMMINENT AND SUBSTANTIAL ENDANGERMENT" 27

CONCLUSION 29

TABLE OF AUTHORITIES

CASES

Cort v. Ash,
422 U.S. 66 (1975)..... 11, 17

Furrer v. Brown,
62 F.3rd 1092 (8th Cir. 1995) 15, 17

Gwaltney of Smithfield v. Chesapeake Bay Foundation,
484 U.S. 49 (1987)..... 29

Kelley, et.al. v. EPA,
15 F.3rd 1100 (D.C.Cir. 1994)..... 3

KFC Western, Inc. v. Meghrig,
49 F.3rd 516 (9th Cir. 1995)..... 15

Middlesex County Sewerage Authority v. National Sea Clammers Association,
453 U.S. 1 (1981)..... 24, 25

Milwaukee v. Illinois (II),
451 U.S. 304 (1981)..... 25

Wilshire Westwood Associates v. Atlantic Richfield Co.,
881 F.2d 801 (9th Cir. 1991)..... 5

Yommer v. McKenzie,
255 Md. 220, 257 A.2d 138 (Md. 1969)... 5

STATUTES

42 U.S.C. 6972 (a)(1)(B)..... 15,27,28
42 U.S.C. 6991b 8

42 U.S.C 6991b (6)(a)..... 13,15
42 U.S.C. 6991b (h)(2)..... 18
42 U.S.C. 6991c 9
42 U.S.C. 9601 (14)..... 5,7
42 U.S.C. 9607 (a)(2)(B)..... 23
42 U.S.C. 9613 (g)..... 23

California Health & Safety Code
Section 25299..... 18
25299.10..... 10
25299.10 (b)(4)..... 10
25299.10 (b)(10)..... 10

LEGISLATIVE HISTORY

Senate Report 94-988,
94th Cong. Second Session, (1976)... 20

House Report # 98-198 (Part 3)
(Judiciary Committee)
98th Cong. 2d Session, (1984) 25

House Report 98-1133,
98th Cong., 2nd Sess. (1984)..... 7, 22

House Report # 99-962,
(99th Cong. 2d Session)..... 9

Congressional Record...

116 Cong. Record 33104 29

Oct. 5, 1984 pp. S13812, 13813..... 27

Legislative Proposals of the 98th Congress

H.R. 4761 (Rep. Ritter)..... 6
S. 2513 (Sen. Durenberger)..... 6

Legislative Proposals of the 99th Congress
HR 2560 (Rep. Florio)..... 7

REGULATORY MATERIALS

40 CFR 280 9
subpart H..... 9, 12

60 Federal Register 46692 2,3
46693 3,9
46694 9
46699 3

STATEMENT OF THE CASE

Amicus hereby adopts the statement of the case as shall be set forth in Petitioner's brief on the merits.

INTR^DUCTION AND INTEREST OF AMICUS

Amicus, the Southern California Service Station Dealers Association, represents the interests of gasoline retailers throughout the region, a region which is the largest single petroleum market in the world.

The activities of the gasoline retailers represented by the Association have been extensively regulated by the Resource Conservation and Recovery Act (RCRA) since 1984 Amendments thereto became effective.

The interpretation of RCRA, particularly with respect to underground storage tanks, is of tremendous concern to the Association.

If the interpretation of the 9th Circuit is upheld, the practical impact on our members would go far beyond the legal implications.

In particular, if upheld, the ruling would hurt our members ability to obtain investment capital, and would substantially drive up our costs of dealing with the RCRA regulated substances that are at the heart of the daily operation of a modern service station.

Moreover, if upheld, the ruling would effectively repeal EPA's newly promulgated underground tank lender liability rule. 60 Fed. Regis. 46692 (Sept. 7, 1995).

EPA explained the need for the rule:

" Until now, EPA believes that concerns over environmental liability have made a significant number of lenders reluctant to make loans to otherwise credit-worthy owners and operators of UST's. The free flow of credit to UST owners (many of whom are small entities and that may rely on secured financing mechanisms for capital){such as our

members},is expected to assist UST owners and operators in meeting their obligations to upgrade, maintain, or otherwise comply with RCRA Subtitle I and other environmental requirements.

Conversely, the lack of such capital may adversely affect the ability of an UST owner to meet its obligations under subtitle I **with concomitant adverse environmental impacts from UST's and UST systems, that are out of compliance due to the lack of financing to make the necessary improvements.** 60 Fed. Regis. at 46692, 46693.

It is extremely important that the Court be aware that the major reason EPA believes the tank lender liability rule will withstand scrutiny is the absence of a private damage action under RCRA subtitle I; whereas a similar rule under CERCLA was struck down by in Kelley, et.al. v. EPA, 15 F.3rd 1100 (D.C.Cir. 1994).

EPA explains:

" The Court held that "EPA lacked statutory authority to restrict by regulation private rights of action under the statute.... **Whereas CERCLA contains a provision regarding private rights of action, there is no explicit**

provision for private rights of action contained under RCRA Subtitle I. " 60 Fed. Regis. at 46699.

This ruling reverses that well settled principal, a principal that has been relied upon by both regulators and the regulated community.

The importance of the rule to our members, a rule put in jeopardy by the 9th Circuit ruling, compels us to seek reversal.

A review of the history of regulation of underground storage tanks, shows why creation of this new federal cause of action by the 9th Circuit is particularly inappropriate.

Prior to 1983, gasoline underground storage tanks were largely out of sight and out of mind.

Those instances where leakage had occurred were dealt with under state law, under a variety of theories, ranging from

strict liability, See, e.g., Yommer v. McKenzie, 255 Md. 220, 257 A.2d 138 (Md. 1969), to trespass and nuisance.

A series of highly publicized leaks, in particular, one at Canob Park, Rhode Island, that ended up on the TV show "60 Minutes", spurred calls for Congressional action.

Members of Congress were told by the EPA that it lacked authority under existing statutes to remediate leaking underground storage tanks ("LUSTS").

In particular, Superfund (CERCLA) could not be used, because gasoline falls within the "petroleum exclusion" found at 42 U.S.C. 9601 (14). See generally, Wilshire Westwood Associates v. Atlantic Richfield Co., 881 F.2d 801 (9th Cir. 1991).

As a result, two bills amending CERCLA were introduced in that 98th Congress, H.R.

4761 by Rep. Ritter, and S. 2513 by Sen. Durenberger, that shared two common objectives:

(1) to repeal the petroleum exclusion and allow Superfund authority to be used in leaking tank cases and (2) to authorize EPA to establish regulations for UST's.

Amicus, represented by Counsel of Record, and our national organization, the Service Station Dealers of America, were key players in the ensuing legislative debate.

The industry viewed repeal of the petroleum exclusion as a costly disaster in the making. If gas stations were hung with the "Superfund Site" label, investment capital and liability insurance would disappear, and the cost of handling our products would substantially increase.

On the other hand, regulation of tanks

was viewed as a sensible step.

As a result, a consensus was reached which enabled a regulatory program to be established under Subtitle I of RCRA created by the 1984 Amendments. See generally, House Report 98-1133, 98th Cong., 2nd Sess. (1984).

Nevertheless, a Congressman or Senator with a tank leak in his or her district still could not call EPA and request a federal response to a tank leak.

The next Congress saw proposals to partially lift the CERCLA petroleum exclusion, 42 U.S.C. 9601(14), by defining releases from petroleum underground tanks as hazardous substances. See, e.g., Section 101 of HR 2560 (99th Cong. 1st Session)(authored by Chairman Florio).

Once again, these proposals to repeal or modify the petroleum exclusion, and thus

subject gasoline UST cases to CERCLA, authority did not survive.

It is instructive to note that had any of these proposals passed, then a federal cause of action for cost recovery in petroleum UST cases would exist under CERCLA.

The fact that they did not pass shows that the 9th Circuit ruling lacks merit.

Congress chose a different path.

Under Section 205 of the 1986 Superfund Amendments and Reauthorization Act (SARA) a comprehensive financial responsibility scheme was established, along with creation of the federal leaking underground storage tank trust fund. See, 42 U.S.C. 6991b.

Although a Superfund bill was used as the vehicle, the fund was created under RCRA, primarily because of the desire to keep underground gasoline storage tanks out of the

ineffective quagmire that Superfund had turned into. See generally, House Report # 99-962, (99th Cong. 2d Session) (The Conference Report on SARA).

The net result of the legislative debate was to create a comprehensive regulatory scheme, See 60 Fed. Regis. 46693- 46694, and 40 CFR 280, 281, that EPA was authorized to, and in fact has, "franchised" to the states under 42 U.S.C. 6991c.

For purposes of this case, the key provisions are those dealing with corrective action, financial responsibility, and the federal and state funds.

EPA's financial responsibility regulations (40 CFR part 280 subpart H) require UST owners and operators to maintain an annual aggregate of "financial assurance" of 1 million to 2 million dollars.

The method of demonstrating financial assurance most relied upon nationwide is the 42 state tank trust funds.

California has a tank fund set up on the authority of the Section 25299.10 of the Health and Safety Code.

That fund, like others, was set up because of the unavailability of insurance, See, Cal. Health & Safety Code, 25299.10 (b)(4), and provides reimbursement of clean up costs and other costs to eligible claimants.

It was also designed so that California could obtain its "tank franchise" from EPA, and was enacted to further:

" the interest of the people of the state in order to avoid <u>direct federal regulation</u>, of persons already subject to state law...Cal. Health & Safety Code 25299.10 (b)(10).

Congress did not create an implied federal cause of action for cost recovery in UST cases; it left the issue to state law.

ARGUMENT

As a threshold matter, SCSSA believes the time has come for the Court to refine the analysis under Cort v. Ash, 422 U.S. 66 (1975), as to when an implied cause of action is available under a federal statute.

Specifically, we believe that where the statute does not expressly provide for the cause of action or relief sought, there must exist a clearly articulated and affirmatively expressed intent in the legislative history that creates an unmistakable implication that Congress intended to create such a cause of action.

If this threshold inquiry is not met, then federal courts should not be required to engage in the analysis under the other three factors enunciated in Cort.

As demonstrated, infra, this test cannot

be met, therefore then decision below should be reversed on this basis alone.

I. THE 9th CIRCUIT DECISION IS BASED UPON ERRONEOUS ASSUMPTIONS

The basis of the 9th Circuit decision is an assumption that to rule against an implied right of action for contribution under RCRA would leave the plaintiffs without a remedy, and thus would be "bad public policy".

The fact is that state law has always provided the remedies for our members, who have more experience with petroleum contaminated properties than anyone else.

As noted, supra, due to the requirements of RCRA that underground tank owners and operators be able to demonstrate financial responsibility, See, 40 CFR Pa t 280 Subpart H, and the unavailability of underground tank insurance for small businesses such as those operated by our members, California and 41

other states have created underground tank clean up funds.

These funds are designed to reimburse petroleum tank clean up costs such as those at issue in this case.

In the cases of orphan tank leaks, where no responsible owner or operator can be found, States and EPA may turn to the federal leaking underground storage tank (LUST) trust fund.

Neither service station dealers, who pay the tax that finances the fund, nor any other private party, are allowed to tap into the federal fund for reimbursement, as the plain language of the statute limits cost recovery to "costs incurred by the Administrator or by a State" . 42 U.S.C. 6991b (6)(a).

The reimbursement issue has quite properly been handled by the states, and claims for reimbursement have been, and

continue to be made to state tank funds in California and 41 other states.

In addition, the full range of legal remedies under state law will continue to be available to our members, who buy more contaminated property than anyone else, as well as to others.

What the 9th Circuit majority saw as bad public policy, was in fact a carefully crafted legislative response, that has created an award winning program and a model federal - state partnership.

In this case, the bad public policy would come about through legislating from the bench, based upon the erroneous assumption that the Respondent, or similarly situated persons would be left without a remedy.

The second erroneous assumption made by the 9th Circuit majority is that the same

remedies available to the EPA Administrator should also be available in a citizen suit. KFC Western v. Meghrig, 49 F.3rd 516, at 521-522.(9th Cir. 1995).

In Furrer v. Brown, 62 F.3rd 1092 (8th Cir. 1995), the 8th Circuit aptly described this argument as a non sequitur. Id. at 1100.

As we have seen, cost recovery from the federal LUST trust fund is limited to costs incurred by "the Administrator or by a State" 42 U.S.C. 6991b (6)(a). The available remedies to the Administrator and a private party are not the same, thus, the 9th Circuit's assumption is contradicted by the plain language of the statute.

II. THE PLAIN LANGUAGE OF THE STATUTE DOES NOT AUTHORIZE THE CAUSE OF ACTION CREATED BY THE 9th CIRCUIT

In pertinent part, 42 U.S.C. 6972(a)(1)(B) allows any person to

maintain a civil suit :

" on his own behalf against any past or present generator, transporter or past or present operator of a treatment, storage or disposal facility who has contributed or is contributing to the past or present to the past or present handling, storage, treatment or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment...

The district court shall have jurisdiction to ... enforce permits and other requirements, to restrain any person who is contributing to the past or present handling, storage, treatment, transportation or disposal of any solid or hazardous waste...
to order such person to take such other action as may be necessary, or both..."

The 9th Circuit majority attempted to support its holding by relying on the term " order such person to take such other action as may be necessary " with respect to regulated substances that pose an imminent and substantial endangerment to health or the environment.

We believe the key is the term "necessary".

SCSSA fails to see how it is "necessary" to award cost recovery or damages under **federal** law in order to have a potentially responsible party abate an imminent and substantial endangerment.

In its analysis of the Cort v. Ash factors in Furrer, the 8th Circuit noted that a persuasive argument can be made that the Furrers, (as well as respondent KFC Western herein), are in a class of persons that the statute is directed against - owners of a storage facility where petroleum products or hazardous waste presents an imminent and substantial endangerment. 62 F.3rd at 1092.

The key point is that the "carrot" of a potential damage award under RCRA is not what would motivate a service station operator or owner of a leaking tank to take action; rather it is the "stick" of "corrective action"

mandated by 42 U.S.C. 6991b(h)(2) et. seq.

The "stick" is provided by the threat of heavy fines and even criminal prosecution in some cases under state (See, e.g. Cal. Health and Safety Code Sec. 25299) or federal law if the corrective action is not taken.

Thus, to characterize potential damage awards made by federal courts under RCRA as "action necessary" defies logic and common sense.

Additionally, to the extent that "carrots" are relevant at all, those carrots exist in the form of the ability of owners and operators who have complied with applicable UST regulations to seek reimbursement under <u>state</u> funds.

The fact that a private party has no right to tap into the <u>federal</u> UST Trust Fund is telling evidence of two facts:

(1) that the federal cause of action implied by the 9th Circuit was expressly rejected by Congress and (2) that an implied federal cost recovery cause of action can not be justified on the basis that it is "action necessary" to ensure that parties undertake the abatement of imminent and substantial hazards to human health or the environment.

Simply put, if Congress had intended to allow the relief sought, it would have done so in the plain language of the statute.

Congress refused to repeal or modify the CERCLA petroleum exclusion, and also did not allow private parties to tap into the federal underground tank trust fund.

Moreover, if the cause of action created by the 9th Circuit had in fact been created by Congress, either expressly or implicitly, in the 1984 RCRA Amendments at issue here, then

there would have been no need to attempt to repeal or modify the petroleum exclusion, or to open up the federal UST fund to private party cost recovery during the 1986 Superfund Amendments debate.

This fact lends further support to view taken by the 8th Circuit in Furrer; and clearly demonstrates that the opinion below must be reversed.

III. THE LEGISLATIVE HISTORY DOES NOT SUPPORT CREATION OF AN IMPLIED CAUSE OF ACTION

RCRA has contained a citizen suit provision dating back to its original enactment in 1976.

According to the discussion of the original citizen suit provision found in Senate Report 94-988, 94th Cong. Second Session at p.18:

" The Committee drew on the similar provisions of the Clean Air Act of 1970 and the Federal Water Pollution Control Act

Amendments of 1972.

The bill provides for citizen participation in the enforcement of requirements and regulations established under this Act.

This provision is carefully restricted to actions where violations of standards or regulations or a failure on the part of officials to perform mandated action is alleged.

Time is provided between notice and filing of the action to give the State or the Administrator an opportunity to act on the alleged violation."

We believe two points are critical here.

First, from its inception, the RCRA citizen suit provision has been "carefully restricted".

Those "careful restrictions" have never been removed by Congress, despite efforts to do so.

Even a cursory review of the Conference Report to the 1984 Amendments reveals that :

" The Senate Amendment contains a similar provision, limiting citizens' right of action ...
CONFERENCE SUBSTITUTE.- The Conference Substitute adopts the Senate Amendment with

<u>additional limitations</u> on citizens' right of action ..."
House Report # 98-1133 (98th Cong. 2d Session, 1984).

If Congress has removed these "careful restrictions" and "additional limitations", then the source of that removal is absent from the legislative history.

Given the detailed list of restrictions spelled out in the Conference Report, (and the statute itself), it stands to reason that such restrictions would appear in the important areas of what costs are recoverable, and the statute of limitations.

The 9th Circuit opinion gives us no guidance as to what costs would be recoverable, rather it would require an ad hoc determination of whether the costs incurred are, or were, "action necessary".

By contrast, under CERCLA, where the right of private parties to seek reimbursement

for clean up costs incurred is expressly provided for in the statute, the only costs recoverable are those that are :

"necessary costs of response incurred by any other person consistent with the National Contingency Plan." 42 U.S.C. 9607(a)(2)(B).

A second area where the 9th Circuit would throw "careful restrictions" out the window is with respect to the statute of limitations.

CERCLA provides a remarkably detailed statute of limitations for cost recovery actions. 42 U.S.C. 9613 (g)(2).

RCRA's silence on this point, both in the statute, as well as in the legislative history, is deafening.

If Congress' intended to create a private right of action for cost recovery or damages under "carefully restricted" citizen suit provision of RCRA, it would have spelled out what costs are recoverable, and when an action

to recover such costs must be filed.

At a minimum, we should be able to find legislative history that clearly articulates and affirmatively expresses what costs are recoverable, what standard is used in conducting judicial review of such cost recovery actions; and what statute of limitations is to be applied.

Such history is conspicuous by its absence, thus it is entirely inappropriate to "unlimit" the carefully restricted RCRA citizen suit provision.

The second point made clear by the legislative history is that the result in this case is virtually dictated by the decision in Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 17 (1981).

As discussed, supra, the history makes

clear that the RCRA citizen suit provision is based upon the comparable provision of the Clean Air Act.

In Sea Clammers, 453 U.S. 1, (1981), the Court noted that the citizen suit provision of Clean Air Act of 1970:

" **makes no provision for damages to the individual**" 453 U.S. at 17, citing 116 Cong. Record 33104 (Statement of Senator Hart).

It should be noted that the legislative history does reveal an effort in the House to undercut the holding of Sea Clammers and also that of Milwaukee v. Illinois (II), 451 U.S. 304 (1981), with respect to the issue of whether actions may be brought under RCRA pursuant to supplementary authority to the express language of the statute inferred by "federal common law". See, House Report 98-198, Part 3, at p.20 (Judiciary Committee).

The provision was dropped in Conference,

as evidenced by the following:

" I note with satisfaction the decision of the Conference Committee to reject the House Amendment entitled " Preservation of Other Rights " ;

This innocuous sounding amendment was intended to convey the message to the federal judiciary that there is a " federal common law " applicable to hazardous waste.

As a result of the decisions in the City of Milwaukee and National Sea Clammers cases, it is clear beyond dispute that there cannot be any "federal common law" in an area covered by a comprehensive Federal statute such as the Solid Waste Disposal Act.....

The ironic thing is that there is hardly any area in which the ad hoc creation of remedies by individual judges is less necessary."
(Cong. Rec. Oct. 5, 1984 pp. S13812, 13813; (remarks of Sen. Simpson).

Whether it is viewed as an implied cause of action, or an attempt to revive the notion that "federal common law" can create this cause of action, the fact is that Congress affirmatively rejected attempts on several fronts to create the ad hoc remedy conjured up by the 9th Circuit majority.

The ruling sought by the Respondents

would revolutionize the rules of the game that those of us who making our living in the petroleum marketing industry have lived with for over a decade.

In conclusion, the legislative history is utterly devoid of the a clearly articulated and affirmatively expressed intent to create the cause of action relied upon by the Respondent, therefore the opinion below must be reversed.

IV. IF SUCH A CAUSE OF ACTION EXISTS IT IS LIMITED TO CASES PRESENTING AN "IMMINENT AND SUBSTANTIAL ENDANGERMENT"

The plain language of the citizen suit provision allows a person to bring an action:

" on his own behalf against any past or present generator, transporter or past or present operator of a treatment, storage or disposal facility who has contributed or is contributing to the past or present handling, storage, treatment or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment...
42 U.S.C. 6972(a)(1)(B).

The key is the plain meaning of the term "imminent".

There is simply no imminent endangerment where the site has question has been cleaned up three years prior to the action being brought.

Thus, even if a cause of action for cost recovery or damages can be implied, it cannot be applied under the facts of this case.

The endangerment in this case is neither "imminent" nor is it ongoing, rather damages are sought for actions of the past.

The opinion in effect rewrites the statute by adding the term "may have" to the existing law, which addresses only situations

> : which may present an imminent and substantial endangerment to health or the environment. 42 U.S.C. 6972(a)(1)(B).

Congress could just as easily added the

term "may have" and thus applied RCRA to past endangerments, as it defined potentially responsible parties as those of the "past or present" whose actions may be causing an imminent endangerment.

The plain language of the statute is clearly dispositive on this point.

In Gwaltney of Smithfield v. Chesapeake Bay Foundation, 484 U.S. 49 (1987), the Court held that under the Federal Water Pollution Act, no action should lie where a citizens suit is based upon violations that occurred entirely in the past. Gwaltney further shows that no cause of action should lie in the case at bar.

CONCLUSION

Congress never intended to create a private right of action for cost recovery or damages under RCRA generally, or under the

underground tank program created by Subtitle I of RCRA specifically.

The practical effect of the 9th Circuit's ruling is enormous. Congress was aware of those effects and rejected efforts to expressly provide the cause of action that the 9th Circuit has implied.

The opinion under review amounts to judicial repeal of a carefully crafted legislative framework that has worked well.

SCSSA therefore must urge the Court to reverse the decision of the 9th Circuit.

Respectfully submitted,

Dimitri G. Daskalopoulos
3 Church Circle
Suite 500
Annapolis, Md. 21401
(301) 261-8880

Supreme Court, U.S.
FILED
NOV 9 1995
CLERK

(18)

No. 95-83

In the Supreme Court of the United States

OCTOBER TERM, 1995

Alan Meghrig and Margaret Meghrig,
Petitioners,
vs.
KFC Western, Inc.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF FOR THE WESTERN STATES PETROLEUM ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

Donna R. Black
Counsel of Record
MANATT, PHELPS & PHILLIPS
11355 West Olympic Boulevard
Los Angeles, California 90064
(310) 312-4000
Counsel for Amicus Curiae
Western States Petroleum Association

26 pp

TABLE OF CONTENTS

INTEREST OF THE AMICUS CURIAE 1

THE LIKELY IMPACT OF THE EXPANSION OF RCRA CITIZEN SUIT REMEDIES 2

I. SUMMARY OF ARGUMENT 4

II. ARGUMENT 5

A. The Underlying Legislative Framework 6

1. RCRA 6

2. CERCLA 8

3. Subtitle I 11

B. Effect of the Decision Below 14

1. The Creation of a New Loosely-Defined Federal Remedy by the Ninth Circuit is Unwarranted 14

2. The Ninth Circuit's Ruling Would Effectively Eliminate The CERCLA Petroleum Exclusion 17

3. If Allowed to Stand, the Decision Below will Significantly Impact the Caseload of the Federal District Courts 19

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Key Tronic Corp. v. United States, ____ U.S.____, 114 S. Ct. 1960 (1994) 8, 10, 16

Middlesex County Sewerage Authority v. National Sea Clammers Assn.; 453 U.S. 1 (1981) 20

Washington State Dept. of Transportation v. Washington Natural Gas Co., 51 F.3d 1489 (9th Cir. 1995) 10

City of Chicago v. Environmental Defense Fund, __ U.S. ___, 114 S.Ct. 1588 (1994) 6

Wilshire Westwood Assoc. v. Atlantic Richfield Corp., 881 F.2d 801 (9th Cir. 1989) 10

Statutes

42 U.S.C. § 6991c 12

42 U.S.C. § 6972 . . . . . 7, 8, 13, 16, 18

42 U.S.C. § 6973 7

42 U.S.C. §§ 6991 - 6991i 11

42 U.S.C. § 9601(14) 4, 10

42 U.S.C. § 9607(a) 9, 15, 19

42 U.S.C. § 9613(g)(2) 10, 15

Miscellaneous

116 Cong. Rec. 33104 (1970) 20

126 Cong. Rec. H11793-11802 (Dec. 3, 1980) . . 11, 18

130 Cong. Rec. S2028, S2080 (daily ed. Feb. 29, 1984) (comments of Sen. Durenberger) 12

132 Cong. Rec. S14931-32 (daily ed. Oct. 3, 1986) . 19

40 C.F.R. §§ 300.400 - 300.440 . . . . . 10, 15

H.R. Rep. No. 1491, 94 Cong., 2d Sess. reprinted in 1976 Oil and Hazardous Substances Liability: Hearings on H.R. 29 & H.R. 85 11

Inside EPA Weekly Report at 1-2 (May 12, 1995) . . 20

Ohio Admin. Code § 1301:7-7-13 13

Pub. L. No. 86-616, 98 Stat. 3221-93 . . . . . 11, 18

Third Quarter Oil Cleanups, Releases Nearly Equal, 26 Env't Rep. 709 (Aug. 11, 1995) 3, 19

U.S. Code Cong. & Admin. News at 1641-42 7

53 Fed. Reg. 37083 (Sept. 23, 1988) 3

4 W. Rodgers, *Environmental Law* § 7.6(b) 8, 13

96th Cong., 1st Sess. 177 (1979) 11

S. Cooke, *The Law of Hazardous Waste* . . . . . passim

No. 95-83

In the Supreme Court of the United States

OCTOBER TERM, 1995

Alan Meghrig and Margaret Meghrig,
Petitioners,
vs.
KFC Western, Inc.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF FOR THE WESTERN STATES PETROLEUM ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS[1]

INTEREST OF THE AMICUS CURIAE

The Western States Petroleum Association ("WSPA") is an association of 31 companies that together account for the bulk of the petroleum exploration, production, refining, transportation and marketing activities in six western states -- Arizona, California, Hawaii, Nevada, Oregon, and

[1] Written consent to the filing of this amicus brief has been obtained from both parties and separately filed with the Court.

Washington.[2] Unlike petitioners, who owned only one commercial property upon which a gas station was formerly located, WSPA's member companies own and have owned thousands of such properties. WSPA is thus well positioned to discuss the important questions raised by the Ninth Circuit's decision and the significant impact of that decision on affected parties as well as on the workload of the district courts.

If not reviewed and reversed by this Court, the Ninth Circuit's decision will, for the first time, allow petroleum contamination cleanup cost recovery actions to proceed in federal court. Congress expressly excluded petroleum product cleanups from the reach of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and limited the remedies provided by the citizen suit provisions of the Resource Conservation and Recovery Act ("RCRA") to injunctive relief. As a result, actions to recover costs for cleaning up property contaminated by petroleum products have been brought exclusively in state courts pursuant to various statutory and common law theories.

THE LIKELY IMPACT OF THE EXPANSION OF RCRA CITIZEN SUIT REMEDIES

The potential impact of the Ninth Circuit's expansion of RCRA citizen suit remedies on federal district courts is staggering. A few years ago, the United States Environmental Protection Agency ("EPA") estimated that over two million underground storage tanks containing

---

[2] WSPA's members also account for the majority of these activities nationally, although WSPA focuses on activities in the six western states listed above.

petroleum products were in operation in the United States. 53 Fed. Reg. 37083 (Sept. 23, 1988). These tanks were located at over 700,000 facilities nationwide. *Id.* Based upon a study of over 10,000 tanks, EPA concluded that approximately 25 percent of those underground petroleum tanks had leaked. *Id.* at 37086. EPA also estimated that the "number of sites needing significant cleanup ... is expected to be in the *tens of thousands* nationwide." *Id.* at 37097 (emphasis added). More recent data indicates that there are over 1,100,000 underground petroleum tanks being actively operated in the United States. There are also approximately 170,000 petroleum tank sites nationwide awaiting cleanup. *Third Quarter Oil Cleanups, Releases Nearly Equal*, 26 Env't Rep. 709 (Aug. 11, 1995).

In preparation for submitting this brief, WSPA polled several of its member companies. Information was sought on the number of service stations owned by member companies and the amount of pending litigation concerning underground petroleum tanks. One company reported that it currently owned about 1,000 service station properties in the western United States and stated that it had owned over 16,000 gas station properties in that region historically. A second company reported owning about 3,000 gas stations nationwide and stated that it had owned over 9,000 gas station properties within the last 10 years. A third company reported owning about 4,000 gas stations nationwide, but could provide no historical ownership information. A fourth company reported owning over 1,000 service stations and stated that it had owned over 25,000 service station properties since the early 1900s.

These four companies also reported being named as defendants in over 1,600 actions for recovery of petroleum contamination cleanup costs brought in state courts over the past five to ten years. Approximately one-third to one-half

of these cases are still pending.

Although the results of the informal survey conducted here are not definitive, a clear indication of the magnitude of the impacts emerges when the responses are considered in light of EPA's published data. EPA reported that underground petroleum tanks were located at over 700,000 *active* facilities nationwide in the year 1988. Given the significant downsizing in the retail marketing end of the petroleum industry both before and after 1988, confirmed by the large number of *former* gas station properties reportedly owned by the surveyed companies, it would appear that underground petroleum tanks historically have been located at well over one million, and perhaps at several million, properties.

EPA also reported that tens of thousands of underground petroleum tank properties would require "significant cleanup." Given that just the four WSPA member companies surveyed reported being named as defendants in over 1,600 petroleum tank cleanup cases, EPA's estimate appears accurate. Extrapolating from the information obtained from WSPA members, it is a reasonable estimate that well over 10,000 underground petroleum storage tank cost recovery actions have been filed in the state courts in the past five to ten years and that several thousand such cases are currently pending.

I. SUMMARY OF ARGUMENT

Currently, all cases seeking the reimbursement of costs expended in cleaning up contamination associated with underground petroleum tanks are brought in state courts. This is because the cornerstone of federal cleanup law, CERCLA, excludes petroleum products from its reach. 42 U.S.C. § 9601(14). And, prior to the decision below, it was

"well settled" that the RCRA citizen suit provision -- which arguably reaches petroleum contamination -- did not provide a cost recovery remedy but was limited to injunctive relief. *Cooke, infra,* § 16.03(3)(f).

If the decision of the Ninth Circuit is not reversed, virtually all petroleum cleanup cost recovery cases will shift from state to federal court. This is primarily because the RCRA citizen suit contains an attorney's fees provision, as well as a provision for recovery of expert's fees, whereas such fees generally cannot be recovered in state courts pursuant to common law theories. In addition, state common law causes of action are subject to definite statutes of limitation whereas the RCRA citizen suit does not contain such a provision. Because of the large number of underground petroleum tank cleanup cases, the shifting of these cases to the federal courts would result in a significant additional burden on the federal court system. Such a result would be ironic, to say the least, because the legislative history of environmental citizen suit provisions expressly indicates that Congress was aware of this potential consequence and deliberately crafted citizen suit provisions to avoid overburdening the federal courts.

Finally, if the decision below is not reversed, the express petroleum exclusion of CERCLA would be nullified and cost recovery actions for cleanups of petroleum could proceed in federal court for the first time.

II. ARGUMENT

While the industrial revolution has produced many useful benefits for society, many industrial processes and practices which were not only completely lega!, but which were widely perceived to be safe and even state-of-the-art at the time, have resulted in the contamination of numerous

properties across the country. This issue first arose in the 1970s and resulted in the enactment of three federal statutes: (1) the Resource Conservation and Recovery Act of 1976 ("RCRA"); (2) the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"); and (3) the underground storage tank provisions of Subtitle I of RCRA enacted as part of the Hazardous and Solid Waste Amendments of 1984 ("Subtitle I").

We will briefly review the relevant portions of RCRA, CERCLA and Subtitle I that comprised federal statutory contamination cleanup law prior to the Ninth Circuit's decision below in order to show that that decision is completely contrary to the underlying legislative framework. We will then illustrate the impacts of the decision on the federal district courts and on the petroleum industry.

A. The Underlying Legislative Framework

1. RCRA

RCRA was signed into law in October 1976. The RCRA legislation completely replaced the former Solid Waste Disposal Act with nine new subtitles, denominated A though H, addressing the management of hazardous and solid wastes. S. Cooke, *The Law of Hazardous Waste*, § 1.02 (1995) ("*Cooke*"). As this Court has noted, "RCRA is a comprehensive environmental statute that empowers EPA to regulate hazardous wastes from cradle to grave, in accordance with the rigorous safeguards and management procedures of Subtitle C" and to regulate solid waste under the "much ... loose[r]" procedures of Subtitle D. *City of Chicago v. Environmental Defense Fund*, __ U.S. ___, 114 S.Ct. 1588, 1590 (1994).

At the time of its passage, RCRA was viewed as closing the "last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes." H.R. Rep. No. 1491, 94 Cong., 2d Sess. *reprinted in* 1976 U.S. Code Cong. & Admin. News at 1641-42. With respect to contamination of property by solid and hazardous wastes, RCRA remains largely prospective in nature -- it is designed primarily to prevent future occurrences of property contamination.

However, two provisions of RCRA do provide a mechanism for reaching past activities that have caused property contamination: (1) the "imminent hazard" provision, 42 U.S.C. § 6973, and (2) the citizen suit provision, 42 U.S.C. § 6972. Under the imminent hazard provision, the Administrator of the EPA is authorized to file suit against any person who has contributed, or who is contributing, to the past or present handling or disposal of a hazardous or solid waste that "may present an imminent or substantial endangerment to human health or the environment." 42 U.S.C. § 6973. If the EPA finds the requisite danger present, it may seek an injunction in district court "to require that the liable parties refrain from potentially harmful activity, and undertake any action necessary to abate the hazard." *Cooke*, § 15.01(1)(a). The EPA is also provided with authority to issue "such orders as may be necessary to protect public health and the environment." 42 U.S.C. § 6973(a).

The citizen suit provision of RCRA authorizes a citizen-plaintiff to file suit in district court against a person who has contributed, or who is contributing, to the past or present handling or disposal of a solid or hazardous waste that "may present an imminent and substantial endangerment to human health or the environment." 42 U.S.C. § 6972(a)(1)(B). The district court has jurisdiction to "restrain"

a liable party, to "order such person to take such other action as may be necessary, or both." *Id.* As a leading treatise on hazardous waste law has stated, "[i]t is well settled that, under [the RCRA citizen suit provision], as is the case with the C[lean] W[ater] A[ct], an award of damages to the plaintiff is not permitted." *Cooke*, § 16.03(3)(f); *see also*, 4 W. Rodgers, *Environmental Law* § 7.6(b) (1992).[3]

2. CERCLA

As noted above, RCRA is largely prospective in operation and regulates the handling and disposal of solid and hazardous waste. Congress recognized "that while RCRA amply addressed the management of hazardous wastes from generation through disposal, it provided *only limited authority* to clean up wastes that had been improperly disposed of." *Cooke*, § 12.02(3) (emphasis added). This, coupled with several well known incidents of environmental contamination, including particularly the Love Canal site in New York, led to the passage of CERCLA in 1980. *Id.*, § 12.02(2). CERCLA is now the "centerpiece of the federal hazardous substance cleanup and liability program." *Id.*, § 12.01(2).

CERCLA provides the federal government with "broad power to command private parties and other government agencies to clean up hazardous waste sites." *Key*

[3] In the decision below, the Ninth Circuit Court of Appeals ruled that the RCRA citizen suit provision, 42 U.S.C. § 6972(a)(1)(B), provides for the recovery of costs expended in cleaning up hazardous waste and solid waste because the statutory language providing the district courts with jurisdiction to "order such person to take such other action as may be necessary" is broad enough to encompass not only mandatory injunctive relief but money damages in the form of recovery of cleanup costs expended.

Tronic Corp. v. United States, ____ U.S.____, 114 S. Ct. 1960, 1964 (1994). The federal government, generally acting through the EPA, may undertake the cleanup itself or may attempt to compel liable parties to undertake the cleanup. *Cooke*, § 12.01(2). Thus, CERCLA, which is largely retrospective in operation, provides a cost recovery mechanism pursuant to which the federal government may file suit in district court to recover its cleanup expenses from liable parties. 42 U.S.C. § 9607(a).

The CERCLA cost recovery cause of action is also available to private party plaintiffs who effectuate a cleanup. CERCLA provides that:

> [A]ny person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of
>
> * * *
>
> shall be liable for --
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian Tribe not inconsistent with the National Contingency Plan; [or]
>
> (B) any other necessary costs of response *incurred by any other person* consistent with the National Contingency Plan.

42 U.S.C. § 6907(a)(2)(A) & (B) (emphasis added).

By providing a private party cost recovery cause of action, CERCLA allows owners of property contaminated

with hazardous substances to clean up their property and then seek recovery of their cleanup expenses in the federal courts from liable parties under CERCLA. Former owners or lessees of contaminated property are typical defendants in a CERCLA private party cost recovery action.

There are, however, some restrictions on the recovery of cleanup costs in these cases. First, the costs incurred must be consistent with the National Contingency Plan ("NCP"). *Washington State Dept. of Transportation v. Washington Natural Gas Co.*, 51 F.3d 1489 (9th Cir. 1995). The NCP contains detailed procedures on how cleanups are to be conducted and covers nearly thirty pages in the Code of Federal Regulations. 40 C.F.R. §§ 300.400 - 300.440. Second, an action must be brought within the statutory limitations period. 42 U.S.C. § 9613(g)(2). Third, attorney's fees are not recoverable in a private party CERCLA cost recovery action. *Key Tronic*, *supra*, 114 S. Ct. 1960.

Finally, there is no cost recovery under CERCLA for cleanup of petroleum product contamination, but only for cleanup of "hazardous substances." The term "hazardous substance" is defined in CERCLA and explicitly "does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance" elsewhere in CERCLA. 42 U.S.C. § 9601(14); *Wilshire Westwood Assoc. v. Atlantic Richfield Corp.*, 881 F.2d 801 (9th Cir. 1989).[4]

---

[4] This definitional exclusion is commonly referred to as the "CERCLA petroleum exclusion." Early subcommittee testimony on the CERCLA legislation evinced Congressional awareness that petroleum contamination posed less of a threat to public health than (continued...)

3. Subtitle I

The Hazardous and Solid Waste Amendments of 1984 were the first federal enactment to address underground petroleum storage tanks. Pub. L. No. 86-616, 98 Stat. 3221-93 *codified at* 42 U.S.C. §§ 6991 - 6991i. This legislation created Subtitle I of RCRA which directed the EPA to establish regulations for leak detection and cleanup of contamination at existing tanks and to establish standards for the installation and operation of new tanks. *Cooke*, § 7.01(2). The provisions of Subtitle I are not at issue here.

The legislative history of Subtitle I contains a noteworthy analysis of the reasons for its enactment:

> Underground storage tanks are seldom regulated. At present [1984], Federal regulation of storage tanks covers only above-ground tanks containing chemical wastes. And, if a tank is leaking, the Federal Government cannot under [CERCLA] authority respond or clean up a spill if it involves petroleum products.
>
> * * *

---

[4](...continued)
those chemicals that later came to be defined as "hazardous substances." *Oil and Hazardous Substances Liability: Hearings on H.R. 29 & H.R. 85 Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. 177 (1979). The legislative debates on the final compromise language of CERCLA indicated that Congress intended to enact subsequent legislation on petroleum contamination. *See* 126 Cong. Rec. H11793-11802 (Dec. 3, 1980).

> The tank storage of one of the most common underground contaminants -- gasoline -- is unregulated because it is not a waste product (and thus not governed under the authority of [RCRA]) and spills of the fuel cannot be cleaned up under [CERCLA] because it is a petroleum product.

130 Cong. Rec. S2028, S2080 (daily ed. Feb. 29, 1984) (comments of Sen. Durenberger).

Congress provided a mechanism in the Subtitle I legislation for the states to enact their own legislation and to adopt regulations governing underground petroleum tanks that would supersede the federal legislation and regulations. 42 U.S.C. § 6991c. Prodded by Subtitle I, virtually all states have adopted laws and promulgated regulations governing underground petroleum tanks. In practical terms, this means that a party installing, operating or cleaning up contamination from a tank refers to applicable state laws and regulations in conducting its activities. These activities are generally regulated and overseen by state agencies that have been delegated these duties by state statute. It is critical to note that *Subtitle I provides no cost recovery cause of action in favor of parties who expend costs cleaning up petroleum contamination from underground tanks.*

In sum, then, the federal statutory framework governing property contamination litigation is as follows. (1) RCRA is largely designed to prevent future contamination problems, and the provisions that address existing contamination are limited to injunctive relief only. (2) CERCLA provides authority for the cleanup of past incidents of contamination, and allows a private party who cleans up "hazardous substance" contamination (not petroleum products) to recover its costs in federal court pursuant to the CERCLA

private party cost recovery action. (3) Petroleum contamination is addressed by state agencies pursuant to state laws and regulations.[5] These state programs were encouraged by federal Subtitle I legislation, which itself provided no cost recovery cause of action.

Because of CERCLA's petroleum exclusion, parties who clean up property contaminated by petroleum from an underground tank cannot bring a CERCLA cost recovery action in federal court. Neither can parties who clean up petroleum contamination on their property bring a cost recovery action in federal court pursuant to Subtitle I because Subtitle I does not provide for such a cause of action. And, until the Ninth Circuit's decision in *KFC Western, Inc. v. Meghrig*, it was well settled that such parties could not bring a cost recovery action in federal court under the RCRA citizen suit provision, 42 U.S.C. § 6972, because only injunctive relief was available under that provision.[6] *Cooke*, § 16.03(3)(d); 4 W. Rogers § 7.6(b). Parties seeking monetary damages in these circumstances have available to

---

[5] For example, many states have detailed and complex formulae set forth in regulations and guidance documents to determine "how clean is clean." *E.g.* Ohio Admin. Code § 1301:7-7-13; Calif. Leaking Underground Fuel Tank Field Manual. Federal regulations contain no parallel provisions.

[6] The RCRA citizen suit provision authorizes a citizen-plaintiff to obtain a prohibitory injunction to halt on-going contamination or a mandatory injunction to compel abatement of existing contamination. This provision applies to both hazardous waste and solid waste. Solid waste arguably includes petroleum contamination. However, the relief available is limited to injunctive relief. Cost recovery is not expressly provided for in the RCRA citizen suit provision.

them a full array of state common law and statutory causes of action which can be brought in state court.[7]

B. Effect of the Decision Below

The decision below, if not reviewed and reversed by this Court, will significantly alter the above-described legislative framework. This, in turn, will result in a series of inconsistencies, anomalies and uncertainties in the law of hazardous substance and petroleum contamination cleanup. In addition, of course, the creation of a new federal remedy in an area as active as petroleum contamination cost recovery cannot help but significantly impact the workload of the federal district courts.

1. The Creation of a New Loosely-Defined Federal Remedy by the Ninth Circuit is Unwarranted

In ruling that the RCRA citizen suit provision allows plaintiffs to recover costs expended in cleaning up hazardous wastes or solid wastes, the Ninth Circuit has created a new federal remedy. Because this "citizen suit cost recovery

---

[7] A leading treatise in the area has noted that "[i]n the absence of federal or state statutes creating private causes of action, private suits involving damage to... property [from contamination] are brought under common law tort principles." *Cooke*, § 17.01(1)(b). Because of the CERCLA petroleum exclusion, lack of a cost recovery cause of action under Subtitle I and the limitation of RCRA citizen suits to injunctive relief, all actions to recover costs expended in cleaning up petroleum contamination have been brought in state courts. Although additional causes of action may be available in some jurisdictions under certain factual situations, most petroleum contamination cases proceed under three common law causes of action -- trespass, nuisance and negligence.

action" was never intended by Congress, it is ill-defined and does not mesh with the existing statutory structure.

For example, RCRA provides no standards for determining which costs expended by a plaintiff are recoverable in a citizen suit cost recovery action. In contrast, under CERCLA, a private party can recover only costs that are necessary and consistent with the National Contingency Plan. 42 U.S.C. § 9607(a). The NCP contains detailed procedural requirements intended to ensure that cleanups are well designed, well implemented and cost effective. 40 C.F.R. §§ 300.400 - 300.440. The lack of such standards under RCRA is anomalous given the Congressional prescription for such standards under CERCLA. Further, this lack of standards is strong evidence that Congress did not intend the RCRA citizen suit provision to be a cost recovery mechanism. If the decision below is allowed to stand, the federal courts will need to engage in extensive interstitial lawmaking to define which costs are recoverable under a RCRA citizen suit cost recovery action. Substantial uncertainty over the proper standards to apply in evaluating costs incurred will prevail until sufficient case law develops.

RCRA provides no statute of limitations for citizen suit cost recovery actions. Again, in contrast, CERCLA provides an express statute of limitations for cost recovery actions. 42 U.S.C. § 9613(g)(2). The lack of a statute of limitations under RCRA is also strong evidence that Congress did not intend the RCRA citizen suit provision to act as a cost recovery mechanism. If the decision below is allowed to stand, the district courts will be required to resolve this issue as well, and substantial uncertainty and unevenness of

decisions will exist for some time.[8]

The RCRA citizen suit provision expressly provides that attorney's fees may be awarded to the prevailing party. 42 U.S.C. § 6972(e). It is a long-standing American rule of law that attorney's fees are not recoverable. *See, Key Tronic, supra*, 114 S.Ct. at 1965. Attorney's fees are not recoverable in private party CERCLA cost recovery actions, nor are attorney's fees generally recoverable in cost recovery cases brought under state common law theories. In all likelihood, Congress decided to allow an attorney's fees award in the context of the RCRA citizen suit provision due to the limited nature of the relief Congress was providing -- prohibitory and mandatory injunctive relief.

If the Ninth Circuit's ruling is allowed to stand, several anomalies will be created. Attorney's fees will be recoverable in a federal "cost recovery" action brought under RCRA, but not under CERCLA. Thus, CERCLA -- the statute designed to address the less numerous but potentially more dangerous hazardous substance sites -- will provide a less comprehensive remedy, from a plaintiff's perspective, than the RCRA citizen suit provision. The end result is clear: all parties seeking cost recovery for any type of contamination cleanup will bring a RCRA citizen suit action instead of, or in addition to, a CERCLA claim in an effort to recover attorney's fees. And, because attorney's fees would

[8] The Ninth Circuit's opinion below has suggested that the doctrine of laches "will alleviate any unfairness that might be created by the lack of a limitations period under RCRA." Pet. App. at A9. This suggestion is troubling both because it will encourage stale claims and because it injects tremendous uncertainty into the law, whereas contamination cases brought in state courts have well-settled limitation periods.

be recoverable in federal court under RCRA, petroleum "cost recovery" actions will be brought in federal court instead of in state court where attorney's fees are not recoverable.

The movement of underground petroleum storage tank cleanup litigation from state to federal courts would be an unfortunate development because the state courts are the more logical forum for resolution of these disputes. As noted above, virtually all states have passed laws and promulgated regulations governing underground petroleum tanks. Accordingly, regulatory decisions regarding underground tanks generally occur at the state level. Determinations as to whether a tank cleanup was done properly, cost-effectively and in a timely manner, and whether the level of cleanup satisfies applicable standards, are all questions of state law.

State courts have been deciding tank cleanup cases for a decade, and a body of case law, based on common law tort concepts, has developed. The state common law courts of general jurisdiction are ideally suited to resolve disputes of this nature by applying general rules of decision to the facts of the cases before them. In addition, the respective obligations of current and former lessees and landowners that are at the center of most underground petroleum tank cleanup cases are matters historically determined by state law.

2. The Ninth Circuit's Ruling Would Effectively Eliminate The CERCLA Petroleum Exclusion

In addition, if the Ninth Circuit's opinion is upheld, the CERCLA petroleum exclusion would be rendered a nullity. The legislative history of CERCLA indicates that Congress understood that petroleum contamination posed less of a threat to public health than the chemicals defined as "hazardous substances" under CERCLA. The legislative

history also indicates that Congress intended to pass subsequent legislation addressing petroleum contamination. *See, supra* at 10 n.4; 126 Cong. Rec. H11793-11802 (Dec. 3, 1980). As discussed above, Subtitle I, enacted in the Hazardous and Solid Waste Amendments of 1984, was that subsequent legislation. But Subtitle I clearly does not contain a cost recovery provision.

The RCRA citizen suit provision was also amended and assumed its current form in the Hazardous and Solid Waste Amendments of 1984. Pub. L. No. 86-616, 98 Stat. 3221-93. Respondents argue that *these* 1984 amendments introduced a cost recovery mechanism into RCRA for petroleum contamination by adding language allowing district courts to "order [persons] to take such other action as may be necessary." 42 U.S.C. § 6972(a)(1)(B). Respondents further argue that *this* is the manner in which Congress decided to create a broad cost recovery remedy and to override the policy decision it had made in including the petroleum exclusion in CERCLA.

But the legislative history of the 1986 amendments to CERCLA, which were enacted only two years after RCRA was amended, indicate that Congress understood that the petroleum exclusion remained effective. A colloquy from the Senate debates makes this abundantly clear:

> "Mr. Bentsen. I would like to ask a question with regard to the effects of this legislation. It is my understanding that these amendments would not diminish the scope of the present exclusion from liability for petroleum found in section 101(14) of the act. Is my understanding correct, Senator?

> Mr. Simpson. Yes, the Senator from Texas is correct in his interpretation. This bill will not diminish the scope of the present petroleum exclusion. That provision, found in section 101(14) of the act, excludes from the definition of 'hazardous substance' all types of petroleum ...."

132 Cong. Rec. S14931-32 (daily ed. Oct. 3, 1986).

This colloquy would have made little sense had the CERCLA petroleum exclusion been effectively nullified by the 1984 amendments to RCRA.

3. If Allowed to Stand, the Decision Below will Significantly Impact the Caseload of the Federal District Courts

As previously stated, approximately 170,000 tank sites nationwide are currently awaiting cleanup. 26 Env't Rep. at 709. Cleanups are being completed at the rate of approximately 25,000 sites per year. *Id.* If only 10 percent of these cleanups result in litigation, approximately 2,500 new tank cleanup cost recovery cases would be filed nationwide each year.

As a result of the Ninth Circuit's decision, plaintiffs will be highly motivated to bring petroleum cost recovery suits in federal court under RCRA because of the possibility of recovering attorney's fees. In addition, plaintiffs who are barred from proceeding in state court on statute of limitations grounds will file in federal court where an uncertain, but potentially much longer, limitations period may apply. The end result will be that virtually all underground tank litigation will shift to federal court. This trend has already begun. *Court Ruling On Cost Recovery Under RCRA Spawns Raft of*

New Lawsuits, Inside EPA Weekly Report at 1-2 (May 12, 1995) (quoting industry spokespersons predicting that "hundreds" of underground petroleum tank cases will soon be filed in the district courts of the Ninth Circuit alone).

It would be ironic if the construction placed upon the RCRA citizen suit provision by the Ninth Circuit resulted in unduly burdening the federal courts. Congress took great pains to avoid just this result when it adopted the first environmental citizen suit provision 25 years ago. This is clearly indicated in Congressional debates such as the following:

> "It has been argued, however, that conferring additional rights on the citizen may burden the courts unduly. *I would argue that the citizen suit provision of [this bill] has been carefully drafted to prevent this consequence from arising*. First of all, it should be noted that the bill makes no provision for damages to the individual. It therefore provides no incentives to suit other than to protect the health and welfare of those suing and others similarly situated. *It will be the rare, rather than the ordinary, person, I suspect, who with no hope of financial gain and the very real prospect of financial loss, will initiate court action under this bill.*"

116 Cong. Rec. 33104 (1970) (comments of Sen. Hart) *quoted in Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1 n.27 (1981) (emphasis added).

The Ninth Circuit's decision takes this very precise indication of legislative intent -- and over a decade of judicial decisions which have adhered to it -- and stands them on their head. Such an arbitrary and ill-founded construction of the law should not be countenanced by this Court.

CONCLUSION

If left to stand, the Ninth Circuit's decision below will work a massive disruption of well-settled principles of federal environmental law and underground petroleum tank litigation. The federal courts will be inundated with new cases better brought in state court, contrary to clearly expressed Congressional intent. Those subject to cost recovery actions under RCRA, which will in some cases involve WSPA member companies, will be subject to a myriad of uncertainties in the litigation process. For these reasons, WSPA respectfully urges this Court to reverse the decision of the Court of Appeals for the Ninth Circuit.

Dated: November 9, 1995.

Respectfully submitted,

Donna R. Black
Counsel of Record
MANATT, PHELPS & PHILLIPS
11355 West Olympic Boulevard
Los Angeles, California 90064
(310) 312-4000
Counsel for Amicus Curiae Western States Petroleum Association

MOTION FILED
DEC 18 1995

No. 95-83

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ALAN MEGHRIG and MARGARET MEGHRIG,
Petitioners,

vs.

KFC WESTERN, INC.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE OUT-OF-TIME BRIEF *AMICUS CURIAE* FOR THE BI-STATE DEVELOPMENT AGENCY OF THE MISSOURI-ILLINOIS METROPOLITAN DISTRICT SUPPORTING RESPONDENT

JOHN FOX ARNOLD
Counsel of Record

NELSON G. WOLFF
LASHLY & BAER, P.C.
714 Locust Street
St. Louis, Missouri 63101
(314) 621-2939

TIMOTHY W. BURNS
901 East Broadway, Suite 100
Columbia, Missouri 65201
(314) 443-3141

JEROME M. ORGAN
School of Law,
University of Missouri-Columbia
Columbia, Missouri 65211
(314) 882-2825

Counsel for Amicus Curiae The Bi-State Development Agency of The Missouri-Illinois Metropolitan District

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

BEST AVAILABLE COPY

No. 95-83

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ALAN MEGHRIG and MARGARET MEGHRIG,
Petitioners,

vs.

KFC WESTERN, INC.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE OUT-OF-TIME BRIEF *AMICUS CURIAE* FOR THE BI-STATE DEVELOPMENT AGENCY OF THE MISSOURI-ILLINOIS METROPOLITAN DISTRICT SUPPORTING RESPONDENT

COMES NOW The Bi-State Development Agency of The Missouri-Illinois Metropolitan District ("Bi-State") as Amicus Curiae, by and through its counsel, pursuant to Rule 30.4, and for its Motion for Leave to File Out-of-Time Brief *Amicus Curiae* supporting Respondent, states as follows:

1. Bi-State delivered its *amicus curiae* brief supporting Respondent to the Court's Clerk by First-class mail, postage

prepaid and bearing a postmark showing that the document was mailed on or before 3:00 p.m. on December 8, 1995, the last day for filing of amicus briefs supporting Respondent , in conformity with Rule 29.2

2.. Bi-State was informed thereafter by the Court's Clerk that this matter previously had been placed upon an expedited docket to which Rule 29.2 did not apply.

3. Prior to the mailing of its brief, Bi-State was unaware that Rule 29.2 did not apply in this matter, as a result of a miscommunication between Bi-State and the parties to this action.

4. No party or amicus curiae to this matter would suffer unfair prejudice if the Court grants Bi-State's Motion to File Out-of-Time.

WHEREFORE, The Bi-State Development Agency of The Missouri-Illinois Metropolitan District as *amicus curiae* respectfully requests this Honorable Court to grant Bi-State's Motion herein and order that the brief for The Bi-State Development Agency of The Missouri-Illinois Metropolitan District as *amicus curiae* supporting Respondent be received out-of-time.

Respectfully submitted,

JOHN FOX ARNOLD
Counsel of Record

NELSON G. WOLFF
Lashly & Baer, P.C.
714 Locust Street
St. Louis, Missouri 63101
(314) 621-2939

TIMOTHY W. BURNS
901 East Broadway, Suite 100
Columbia, Missouri 65201
(314) 443-3141

JEROME M. ORGAN
School of Law,
University of Missouri-Columbia,
Columbia, Missouri 65211
(314) 882-2825

Counsel for Amicus Curiae Bi-State Development Agency of The Missouri-Illinois Metropolitan District

...TION FILED
DEC 19 1995

No. 95-83

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995.

ALAN MEGHRIG AND MARGARET MEGHRIG,
Petitioners,

v.

KFC WESTERN, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF AMICI CURIAE FOR PERMISSION TO FILE A LATE BRIEF

Massachusetts, Missouri, Alaska, Florida, Guam, Kansas, Kentucky, Louisiana, Nevada, New Jersey, New Mexico, New York, West Virginia, and Wisconsin

SCOTT HARSHBARGER
Attorney General
of Massachusetts

WILLIAM L. PARDEE*
JOHN BELING
KAREN MCGUIRE
Assistant Attorneys General
200 Portland Street
Boston, MA 02114
(617) 727-2200
**Counsel of Record*

JEREMIAH W. NIXON
Attorney General
State of Missouri

JAMES LAYTON
JOSEPH P. BINDBEUTEL
DOUGLAS E. NELSON
Assistant Attorneys General

See inside front cover for additional counsel

4 pp

BRUCE M. BOTELHO
Attorney General
State of Alaska

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

CALVIN E. HOLLOWAY
Attorney General
Territory of Guam

CARLA STOLLA
Attorney General
State of Kansas

CHRIS GORMAN
Attorney General
Commonwealth of Kentucky

RICHARD P. IEYOUB
Attorney General
State of Louisiana

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

DEBORAH T. PORITZ
Attorney General
State of New Jersey

TOM UDALL
Attorney General
State of New Mexico

DENNIS C. VACCO
Attorney General
State of New York

DARRELL V. MCGRAW, JR.
Attorney General
State of West Virginia

JAMES E. DOYLE
Attorney General
State of Wisconsin

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995.

No. 95-83

ALAN MEGHRIG AND MARGARET MEGHRIG,
Petitioners,

v.

KFC WESTERN, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF AMICI CURIAE FOR PERMISSION TO FILE A LATE BRIEF

The Amici States[1] request leave to file their Brief in Support of Respondents late. The Amici States mailed their brief First Class Mail on December 8, 1995. The Clerk of this Court subsequently advised counsel that an Order was issued in connection with this case, directing that all briefs be received by this Court on December 8, 1995. Counsel was not aware of this Order.

---

[1] The States participating as amici curiae are: Alaska, Florida, Guam, Kansas, Kentucky, Massachusets, Missouri, Nevada, New Jersey, New Mexico, New York, West Virginia and Wisconsin.

The Amici States regret any inconvenience that this untimely filing may have caused. Due to the importance of this matter to the Amici States, they urge this Court to accept their brief for consideration.

Respectfully submitted,

SCOTT HARSHBARGER
Attorney General
of Massachusetts

WILLIAM L. PARDEE*
Assistant Attorney General
200 Portland Street
Boston, MA 02114
(617) 727-2200
**Counsel of Record*

December 19, 1995

No. 95-83

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995.

ALAN MEGHRIG AND MARGARET MEGHRIG,
Petitioners,

v.

KFC WESTERN, INC.,
Respondent.

ON WRIT OF CERIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE
Massachusetts, Missouri, Alaska, Florida, Guam, Kansas, Kentucky, Louisiana, Nevada, New Jersey, New Mexico, New York, West Virginia, and Wisconsin

SCOTT HARSHBARGER
Attorney General
of Massachusetts

WILLIAM L. PARDEE*
JOHN BELING
KAREN MCGUIRE
Assistant Attorneys General
200 Portland Street
Boston, MA 02114
(617) 727-2200
**Counsel of Record*

JEREMIAH W. NIXON
Attorney General
State of Missouri

JAMES LAYTON
JOSEPH P. BINDBEUTEL
DOUGLAS E. NELSON
Assistant Attorneys General

See inside front cover for additional counsel

BRUCE M. BOTELHO
Attorney General
State of Alaska

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

CALVIN E. HOLLOWAY
Attorney General
Territory of Guam

CARLA STOLLA
Attorney General
State of Kansas

CHRIS GORMAN
Attorney General
Commonwealth of Kentucky

RICHARD P. IEYOUB
Attorney General
State of Louisiana

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

DEBORAH T. PORITZ
Attorney General
State of New Jersey

TOM UDALL
Attorney General
State of New Mexico

DENNIS C. VACCO
Attorney General
State of New York

DARRELL V. MCGRAW, JR.
Attorney General
State of West Virginia

JAMES E. DOYLE
Attorney General
State of Wisconsin

Table of Contents

Interest of Amici Curiae 1

Summary of Argument 3

Argument 6

I. Section 7002 of RCRA Confers Upon the Courts Full Equitable Jurisdiction, Including the Power to Award Restitution. 6

A. Where Congress Has Conferred Equitable Jurisdiction Over a Matter, It Is Presumed To Have Conferred The Ability To Award All Traditional Equitable Remedies. 6

B. Section 7002 Confers Upon the Courts Full Equitable Jurisdiction, Including the Power to Award Restitution. 8

1. The Power Granted to Courts Under Section 7002 is Identical to the Power Granted to Courts Under Section 7003 9

2. An Order Awarding Restitution is Proper as an "Equitable Adjunct to An Injunction Decree" 13

3. An Order Awarding Restitution is an "Order Proper and Necessary To Enforce Compliance" With RCRA 13

II. Section 7002 Empowers Courts To Award Restitution To Citizens Who, Prior to Filing Suit, Incur Expenses In Abating A Condition Which May Present An Imminent And Substantial Endangerment To Health Or The Environment. 17

A. Section 7002 Is Not Limited To Prospective Relief. 18

B. Denying Courts the Ability to Award Restitution Where a Citizen Has Acted To Abate the Potential Hazard Prior To Filing Suit Would Frustrate Congressional Intent. 22

Conclusion 30

TABLE OF AUTHORITIES

Cases.

Brandon Township v. Jerome Builders, Inc., 80 Mich.App.180, 263 N.W.2d 326 (1977) 17

Brown v. Swann, 35 U.S. 497 (1836) 2

California v. American Stores Co., 495 U.S. 271 (1990) 8

Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558 (1990) 16

Commonwealth of Massachusetts v. United States Department of Agriculture, C.A. No. 95-11668 REK (D. Mass., filed July 27, 1995) 28, 29

Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 6

.*Cort v. Ash*, 422 U.S. 66 (1975) 6

Craig Lyle Ltd. Partnership v. Land O'Lakes, Inc., 877 F.Supp. 476 (D. Minn. 1995) 27

Dague v. City of Burlington, 935 F.2d 1343 (2d Cir. 1991) 24

Dalehite v. United States, 346 U.S. 15 (1953) 28

Department of Energy v. Ohio,
503 U.S. 607 (1989) 3

Furrer v. Brown, 62 F.3d 1092
(8th Cir. 1995) 6, 7, 10, 14, 19

Gwaltney of Smithfield v. Chesapeake Bay Foundation, 484 U.S. 49 (1987) 19, 20, 24

Hatco Corp. v. W.R. Grace & Co.,
59 F.3d 400 (3d Cir. 1995) 16

Hecht Co. v. Bowles, 321 U.S. 321 (1944) 2, 7, 12

KFC Western, Inc. v. Meghrig,
49 F.3d 518 (9th Cir. 1995) 4, 10, 14

Laird v. Helms, 406 U.S. 797 (1972) 28

Maryland Casualty Co. v. Armco, Inc.,
822 F.2d 1348 (4th Cir. 1987) 16

Middlesex County Bd. of Chosen Freeholders v. New Jersey, 645 F.Supp. 715 (D.N.J. 1986) 12

Mitchell v. Robert De Mario Jewelry,
361 U.S. 288 (1960) 8

New York v. United States,
620 F.Supp. 374 (E.D.N.Y. 1985) 29

Oscar Mayer & Co. v. Evans,
441 U.S. 750 (1979) 12

Paper Recycling, Inc. v. Amoco Oil Co.,
856 F.Supp. 671 (N.D. Ga. 1993) 27

Porter v. Warner Holding Co.,
328 U.S. 395 (1946) 2, 4, 7, 8, 10, 12, 13, 16, 17, 20, 21, 23

Renegotiation Board v. Bannercraft Co.,
415 U.S. 1 (1974) 8

State v. Schenectady Chemicals, Inc.,
103 A.D.2d 33, 479 N.Y.S.2d 1010 (N.Y.App.1984) 16

Transamerica Mortgage Advisors, Inc. v. Lewis,
444 U.S. 11 (1979) 8

United States v. Aceto Agric. Chemicals Corp.,
872 F.2d 1373 (8th Cir. 1989) 10, 18, 19

United States v. Conservation Chemical Co.,
619 F.Supp. 162 (D.C. Mo. 1985) 11

United States v. Moore, 340 U.S. 616 (1951) 21, 22

United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726 (8th Cir. 1986),
cert. denied, 484 U.S. 848 (1987) 10, 14, 16

United States v. Price, 688 F.2d 204
(3d Cir. 1982) 2,10,11, 14, 15, 22

United States v. Reilly Tar & Chemical Corp.,
546 F.Supp. 1100 (D.Minn. 1982) 18

United States v. Valentine,
856 F.Supp. 627 (D. Wyo. 1994) 11, 15, 26

United States v. Waste Industries,
734 F.2d 159 (4th Cir. 1984) 18

Wyandotte Trans. Co. v. United States,
389 U.S. 191 (1967) 13, 16

Zands v. Nelson,
779 F.Supp. 1254 (S.D. Cal. 1991) 27

Statutes, Regulations & Court Rules.

15 U.S.C. § 2619 (Toxic Substances Control Act) 19

28 U.S.C. §§ 1346, 2671 *et seq.*
(Federal Tort Claims Act) 29

42 U.S.C. § 300j-8 (Safe Drinking Water Act) 19

42 U.S.C. § 6972 (RCRA § 7002) 3-29

42 U.S.C. § 6973 (RCRA § 7003) 4, 5, 9-12, 14, 15, 17-19, 22, 23, 26, 28

42 U.S.C. §§ 6901-6987 2-6, 10, 12-15, 17-20, 24, 25, 27

42 U.S.C. § 9601(14) 29

42 U.S.C. § 9659 (Comprehensive Environmental
Response Compensation and Liability Act) 19, 29

Clayton Act, § 16 8

Fair Labor Standards Act, § 15(a)(3) 8

Investment Advisers Act of 1940, § 215 8

Mass. Gen. Laws c. 21E, § 5 (1983 & 1995 Supp.) 29

Miscellaneous.

H.R. Rep. No. 198, 98th Cong., 2d Sess., pt. I,
53 (1983), *reprinted in* 1984 U.S.C.C.A.N.
5612 13, 22, 24, 25

Restatement of Restitution, § 115 (1937) 15

S. Rep. No. 284, 98th Cong.,
1st Sess. (1983) 11

S. Rep. No. 96-172, 96th Cong., 1st Sess., (1979),
reprinted in 1980 U.S.C.C.A.N. 5019 (1980) 28

S. Rep. No. 96-172, 96th Cong., 1st Sess., *reprinted in*
[1980] U.S.C.C.A.N. 5019 (1980) 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995.

No. 95-83

ALAN MEGHRIG AND MARGARET MEGHRIG,
Petitioners,

v.

KFC WESTERN, INC.,
Respondent.

ON WRIT OF CERIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE

Massachusetts, Missouri, Florida, Guam, Kansas,
Kentucky, Louisiana, Nevada, New Jersey, New Mexico,
New York, West Virginia, and Wisconsin

Interest of Amici Curiae

The primary interest of the amici states[1] in this case is the preservation of the ability of federal courts sitting in equity to devise appropriate remedies in environmental matters. It is an ancient maxim of this Court that "[t]he great principles of equity, securing complete justice, should not yield to light

---

[1]The states participating in this brief as amici curiae are: Florida, Guam, Kansas, Kentucky, Massachusetts, Missouri, Nevada, New Jersey, New Mexico, New York, West Virginia and Wisconsin.

inferences, or doubtful construction." *Brown v. Swann*, 35 U.S. 497, 503 (1836).

The ability of the states and their citizens to "secure complete justice" in environmental matters is dependent in part upon the ability of the federal judiciary to administer the federal environmental laws in a flexible manner. Where the environmental laws grant the courts their full equitable powers in order to "protect the public health, the environment, and public water supplies from the pernicious effects of toxic wastes[,] . . . [c]ourts should not undermine the will of Congress by either withholding relief or granting it grudgingly." *United States v. Price*, 688 F.2d 204, 214 (3d Cir. 1982). The States, as the primary governmental guardians of the public health and welfare, have a great interest in preserving for themselves and for their citizens the judicial tools needed to perform that mission.

Accordingly, the amici urge this Court to affirm the decision of the Ninth Circuit Court of Appeals and to re-affirm the principle that where the federal district courts sit in equity and the public interest is at stake, the courts have the power "to do equity and to mould each decree to the necessities of the particular case." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944); *see also Porter v. Warner Holding Co.*, 328 U.S. 395, 397 (1946).

This aim can be achieved by holding that the Citizens' Suit provision of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6987, enables courts to award restitution to plaintiffs in appropriate circumstances.

Such a decision is of particular interest to states which lack a statute that enables states[2] or private parties to recover the costs of responding to petroleum contamination which has produced a hazardous condition, since it is established that this provision applies to petroleum spills which endanger the public. In addition, interpreting this provision in such a fashion will in most circumstances provide the only means for the states and their citizens to recover from the federal government the costs of cleaning up petroleum contamination, where the federal government is responible for a release of petroleum that has created a hazardous condition.

Summary of Argument

The issue before the Court is the power of the district courts to award restitution to a party who has expended funds responding to conditions which may present an "imminent and substantial endangerment to health or the environment," pursuant to Section 7002[3] of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6987 (1988 & Supp. 1993). In holding that restitution is available under Section 7002, the Ninth Circuit relied upon decisions of federal courts recognizing that restitution is available to the federal government when it sues under a similar provision of RCRA, as well as the strong policy reasons for permitting citizens to

---

[2]As this Court has recognized, a State is a "person" which may maintain an action under Section 7002. *See Department of Energy v. Ohio*, 503 U.S. 607 (1989).

[3]Section 7002 is codified at 42 U.S.C. § 6972.

sue for restitution under Section 7002. *See KFC Western, Inc. v. Meghrig*, 49 F.3d 518, 521-24 (9th Cir. 1995). This Court should affirm the decision for the reasons stated by the Ninth Circuit. More fundamentally, the decision should be affirmed under the precedents of this Court holding that where Congress has invoked the courts' equitable powers, courts may in their discretion exercise the full range of those powers. The decision below is a proper expression of the inherent equitable powers of the federal district courts to award restitution to citizens who have expended funds in response to conditions which may present an imminent and substantial endangerment to health or the environment.

The "imminent and substantial endangerment" provisions of RCRA, Sections 7002 and 7003, empower citizens and the federal government, respectively, to bring suit in federal court against "any person" who "has contributed to or who is contributing to" the "past or present" "handling, storage, treatment, transportation or disposal of any solid or hazardous waste," which "may present an imminent and substantial endangerment to health or the environment." *See* 42 U.S.C. § 6972(a)(1)(B); 42 U.S.C. § 6973(a).

Sections 7002 and 7003, which are essentially codifications of the common law of public nuisance, confer upon the courts equitable jurisdiction. Once it is determined that Congress intends that courts have equitable jurisdiction over a matter, the "full scope of that jurisdiction is to be recognized and applied," unless a statute restricts that jurisdiction. *Porter*, 328 U.S. at 398. Neither Section 7002 nor Section 7003 restricts the ability of the district courts to invoke their full equitable powers; rather, the language of both Sections gives courts wide latitude in fashioning appropriate remedies. Because the award of

restitution is a remedy that has traditionally been within the equitable powers of courts to award, both Sections 7002 and 7003 must be construed as permitting courts to award restitution to citizens or to the federal government when either has expended funds in responding to conditions which may present an "imminent and substantial endangerment to health or the environment." Construing the statute in such a fashion is consistent with the principles of statutory construction and furthers the purpose that Congress intended for the Citizens Suit provision of RCRA.

In addition, a court may award restitution under either Section even where the condition which may present an imminent and substantial endangerment to health of the environment has been successfully abated prior to the commencement of the action. Under established precedent of this Court, where statutes confer upon courts the authority to award both prospective (i.e., injunctive) relief and other appropriate equitable relief, the fact that the need for an injunction has ceased prior to the filing of the lawsuit does not deprive the courts of their power to award other equitable relief, such as restitution. Denying the award of restitution to a citizen or to the federal government where they have taken steps to prevent harm to the public health or the environment in advance of litigation would frustrate the intent of Congress in enacting these provisions.

Argument

I. SECTION 7002 OF RCRA CONFERS UPON THE COURTS FULL EQUITABLE JURISDICTION, INCLUDING THE POWER TO AWARD RESTITUTION.

A. *Where Congress Has Conferred Equitable Jurisdiction Over a Matter, It Is Presumed To Have Conferred The Ability To Award All Traditional Equitable Remedies.*

It is axiomatic that "the starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Section 7002 of RCRA empowers the district courts to "restrain any person who has contributed to or is contributing to" activity "which may present an imminent and substantial endangerment to health or the environment;" and to order any person who has contributed to or is contributing to activity which may present an imminent and substantial endangerment to health or the environment to "take such other action as may be necessary." 42 U.S.C. § 6972(a). This grant of authority unquestionably confers upon the courts equitable jurisdiction.[4]

[4]The Eighth Circuit, in *Furrer v. Brown*, 62 F.3d 1092 (8th Cir. 1995), ignored this plain grant of equitable jurisdiction by proceeding to analyze Section 7002 under the test set forth by this Court in *Cort v. Ash*, 422 U.S. 66 (1975). *See* 62 F.3d at 1094-97. The issue before this Court is not whether Section 7002 creates an implied private right of action for monetary damages, as the Eighth Circuit in *Furrer* seemed to believe,

See Hecht Co. v. Bowles, 321 U.S. at 329 (statute which empowers court to issue injunctions confers equitable jurisdiction).

Once it is established that a statute confers equitable jurisdiction upon the courts, the next question to be resolved is whether the statutory provision in question evinces an intent on the part of Congress to limit the equitable powers of the district courts in awarding relief in such matters. *Porter*, 328 U.S. at 397. A grant of equitable jurisdiction is presumed to provide the court with full equitable jurisdiction, and "since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Id.* (citation omitted).

In *Porter*, the Court held that the Emergency Price Control Act, in authorizing the district court to enter "a permanent or temporary injunction, restraining order, or other order," grants full equitable jurisdiction, reasoning that "the term 'other order' contemplates a remedy other than that of an injunction or restraining order, a remedy entered in the exercise of the District Court's equitable discretion." *Id.* at 399; *see also Hecht Co. v. Bowles*, 321 U.S. at 328 (term "other order" contemplates equitable relief other than injunction or restraining order).[5] Subsequent decisions of this Court have remained

and as Petitioners argue. *Id.*; *see* Pet. Br. at 18-41. Rather, since Section 7002 plainly provides a means for citizens to invoke the courts' equitable jurisdiction, the issue is the scope of the district courts' equitable powers in fashioning remedies under that section.

[5]As this Court subsequently noted with regard to the *Porter* decision, the Court in that case found broad equity powers conferred under the

faithful to the principles set forth in *Porter*, and have consistently applied a broad interpretation to statutes that grant to courts equitable jurisdiction "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity . . ." *Porter*, 325 U.S. at 398; *see, e.g., California v. American Stores Co.*, 495 U.S. 271, 295 (1990)(§ 16 of the Clayton Act permits courts to order divestiture; applying *Porter*); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979)(§ 215 of the Investment Advisers Act of 1940 granted to courts equitable jurisdiction and therefore power to award restitution); *Mitchell v. Robert De Mario Jewelry*, 361 U.S. 288, 296 (1960)(courts have equitable jurisdiction under § 15(a)(3) of the Fair Labor Standards Act to order an employer to reimburse employees for wages lost due to an unlawful discharge).

Emergency Price Control Act, "not only because of the 'other order' language, but because of the 'traditional equity powers of a court.'" *Renegotiation Board v. Bannercraft Co.*, 415 U.S. 1, 19 (1974)(quoting *Porter*, 328 U.S. at 400).

B. *Section 7002 Confers Upon the Courts Full Equitable Jurisdiction, Including the Power to Award Restitution.*

1. The Power Granted to Courts Under Section 7002 is Identical to the Power Granted to Courts Under Section 7003.

The Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992, (1988), contains two parallel provisions that address the power of courts to respond to conditions which may present an "imminent and substantial endangerment to health or the environment." See § 7002, 42 U.S.C. § 6972(a)(1)(B)(authorizing relief when "any person" alleges conditions of threatened or actual imminent and substantial endangerment); § 7003, 42 U.S.C. § 6973 (providing for relief where federal government brings action).

These provisions contain identical language regarding the type and scope of relief available to plaintiffs. In addition to giving courts the power to "restrain" a defendant who has allegedly created a hazardous condition, the statute confers the power to the courts " *to order such person to take such other action as may be necessary. . .*" *See* 42 U.S.C. § 6972()(1)(B); 42 U.S.C. § 6973 (emphasis supplied).[6]

---

[6]As is noted by the United States in its brief as amicus curiae, the provisions differ in that Section 7003 also authorizes the federal government to "take other action under this section." *See* U.S. Br. at 21, n. 23. The United States is incorrect when it suggests that Section 7003's express authorization for the *executive* to take action restricts Section 7002's broad invocation of the *judiciary's* equitable powers. *Id.* (arguing that courts have greater latitude in awarding restitution to the United States). Moreover, the United States'

The Ninth Circuit relied upon this phrase for its finding that parties suing under the Citizens' Suit provision in Section 7002(a)(1)(B) are not limited to actions seeking injunctive relief. *See KFC Western*, 49 F.3d at 521. The Ninth Circuit based its construction of that provision primarily upon other courts' interpretations of Section 7003 of RCRA, which addresses the federal government's right to sue to abate conditions which may present imminent and substantial endangerments to health or the environment. *Id.* at 522.[7] The

---

position that Section 7003's grant of authority to the Environmental Protection Agency to take action under the section places it on different footing from a private citizen who takes action is misplaced. *Id.* As previously noted, states are "persons" under Section 7002, and obviously are entitled to take appropriate action to protect their citizens; indeed, individual citizens possess the right and the ability to take steps to protect themselves and others from endangerment, independent of any grant from Congress. The United States' effort to construe the express authorization of executive action under Section 7003 as reflecting Congressional intent to limit the scope of the judiciary's equitable authority under Section 7002 is obscure, at best, and is not the type of "clear and valid legislative command" necessary to restrict the courts' equitable jurisdiction. *See Porter*, 328 U.S. at 398.

[7]The Ninth Circuit relied on two Eighth Circuit decisions, *United States v. Aceto Agric. Chemicals Corp.*, 872 F.2d 1373 (8th Cir. 1989), and *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987), and one Third Circuit case, *United States v. Price*, 688 F.2d 204 (3d Cir. 1982). While the Ninth Circuit's reliance on the Eighth Circuit's cases has been thrown into doubt by that Court's decision in *Furrer v. Brown*, 62 F.3d 1092 (8th Cir. 1995)(stating that the issue of availability of restitution under Section 7003 was never directly ruled upon in prior cases and holding that restitution unavailable under

Ninth Circuit's analysis fully supports the decision.

Sections 7002 and 7003 are parallel provisions, so that the availability of any remedy under one section strongly implies that the remedy is also available under the other. As the Senate Report on the 1984 amendments to RCRA, which added Section 7002(a)(1)(B), states, "[t]hese amendments are intended to allow citizens *exactly the same* broad substantive and procedural claim which is already available to the United States under Section 7003 . . ." S. Rep. No. 284, 98th Cong., 1st Sess. at 56-57 (1983). That report further noted that to the extent these Sections differed, these differences "are not intended to reflect a difference in such claims, but merely to clarify that citizens will have the same claim presently available to the United States." *Id.* Thus, it is pertinent that the United States may sue for restitution under Section 7003. *See United States v. Price*, 688 F.2d 204, 214 (3d Cir. 1982)(authority granted to the courts under section 7003 was "intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risks posed by toxic wastes"). Other courts have recognized the broad grant of equitable jurisdiction contained in Section 7003. *See, e.g., United States v. Valentine*, 856 F.Supp. 627, 633 (D. Wyo. 1994)(contribution is available remedy; "like restitution, contribution is an equitable remedy to prevent unjust enrichment"); *United States v. Conservation Chem. Co.*, 619 F.Supp. 162, 199 (D.C. Mo. 1985)("[t]he Court has broad authority under Section 7003 to grant the equitable relief

---

Section 7002), the Third Circuit's decision in *Price* still stands for the proposition that restitution is available under Section 7003. *See Price*, 688 F.2d at 214.

necessary to eliminate the endangerment").

The provisions of Section 7002 that address the power of the courts to enforce that section are basically identical to those in Section 7003. *Compare* 42 U.S.C. § 6972 *with* 42 U.S.C. § 6973(a). Accordingly, as one court has stated, the imminent and substantial endangerment provision in Section 7002 "is designed to provide a private means of obtaining the same relief that the EPA Administrator has previously been authorized to seek under RCRA by 7003." *Middlesex County Bd. of Chosen Freeholders v. New Jersey*, 645 F.Supp. 715, 721 (D.N.J. 1986); *see also Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979)(where statutory language in one act is *in haec verba* with the language of another act, it is appropriate to conclude that Congress intended an identical construction of each term).

This Court's decision in *Porter* is particularly instructive here, given the similarity of the language of Section 205(a) of the Emergency Price Control Act, construed in *Porter*, and the language of Sections 7002 and 7003. The critical language in *Porter* empowers the district courts to effect the purposes of the act through the issuance of "other order[s]." 328 U.S. at 400. Section 7002 of RCRA contains a similarly broad provision, that the court can "order such person to take such other action as may be necessary." 42 U.S.C. § 6972. This provision plainly contemplates that the court can issue orders providing for other than injunctive relief. *Hecht Co.*, 321 U.S. at 328. As in *Porter*, the award of restitution under Section 7002 of RCRA can be viewed as an "equitable adjunct to an injunction

decree," or as "an order appropriate and necessary to enforce compliance with the Act." *Porter*, 328 U.S. at 395.

2. An Order Awarding Restitution is Proper as an "Equitable Adjunct to An Injunction Decree".

The award of restitution to a RCRA citizens suit plaintiff is an appropriate "equitable adjunct to a claim for injunctive relief." *Id.* In such a situation, "where . . . the equitable jurisdiction of the court has properly been invoked for injunctive purposes, the court has the power to . . . award complete relief even though the decree includes that which might be conferred by a court of law." *Id.* Where the court has jurisdiction to "restrain," or enjoin, the person who caused the condition which may present an endangerment to health or the environment, it is fully within that court's equitable jurisdiction to order such a person to pay restitution to a party who has expended funds in responding to the potential endangerment. *Id.* To hold otherwise "would permit the result, extraordinary in our jurisprudence, of a wrongdoer shifting responsibility for his negligence onto his victim." *Wyandotte Trans. Co. v. United States*, 389 U.S. 191, 204 (1967).

3. An Order Awarding Restitution is an "Order Proper and Necessary To Enforce Compliance" With RCRA .

An award of restitution is also warranted under *Porter* because the availability of such relief will foster compliance with the goals of RCRA and, specifically, with Congress' goal to quickly abate conditions which produce or threaten to produce imminent and substantial endangerments to health or

the environment. Congress has stated that "the primary goal" of Section 7002(a)(1)(B) is "the prompt abatement of imminent and substantial endangerments." H.R. Rep. No. 198, 98th Cong., 2d Sess., pt. I, 53 (1983), *reprinted in* 1984 U.S.C.C.A.N. 5612. Allowing a party to be reimbursed for the costs expended in abating the complained-of condition furthers this purpose. This is particularly so given the fact that an action brought pursuant to Section 7002(a)(1)(B) cannot be commenced in certain cases until 90 days after notice has been given to the defendant, the Administrator of the EPA, and the State in which the alleged endangerment may occur. 42 U.S.C. § 6972(b)(2)(A). Allowing restitution for costs expended before or during that 90-day notice period furthers the purpose of the Citizens' Suit Provision in securing the prompt abatement of imminent and substantial endangerments.[8] *See KFC Western*, 49 F.3d at 524 (award of restitution serves purpose of providing prompt response to endangerment); *see also Price*, 688 F.2d at 214 (permitting restitution furthers purpose of RCRA).

[8]The Eighth Circuit in *Furrer* relied in part upon the 90 day notice provisions in finding that only injunctive relief is available under Section 7002. 62 F.3d at 1098. That court failed to note that the notice and delay provisions of the act do not explicitly limit the right of a citizen suing under the act the right to recover costs expended during that period, should the reputed violator fail to take steps to abate the complained of condition. *Id.*

In its report on the 1980[9] amendments to RCRA, the Senate noted that:

> [S]ection 7003 is essentially a codification of common law public nuisance remedies . . . [and] therefore, incorporates the legal theories used for centuries to assess liability for creating a public nuisance . . . and to determine appropriate remedies . . .

S. Rep. No. 172, 96th Cong., 1st Sess., at 5 (1979), *reprinted in* U.S.C.C.A.N. 5019, 5023 (1980); *see also United States v. Price*, 688 F.2d 204, 213 (3d Cir. 1982). Both Section 7002 and Section 7003 were intended by Congress to constitute codifications of the common law of public nuisance, and to enable plaintiffs to receive the same types of relief that were available to plaintiffs in public nuisance suits. As shown below, this relief has traditionally included restitution.

It has long been recognized that restitution is an available remedy in public nuisance cases under the common law. *See* Restatement of Restitution, § 115 (1937); U.S. Br. at 22-28. In the comment to Section 115, it is noted that the "abatement of a serious public nuisance . . . is another situation calling for the [award of restitution]." Comment b, Restatement of

[9]When the Resource Conservation and Recovery Act was passed into law as an amendment to the Solid Waste Disposal Act in 1976, the legislative history of the act contained "no specific mention of section 7003 and no mention of the reasons for its insertion." *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 738 (8th Cir. 1986). "Consequently, courts have typically relied upon the legislative history of the 1980 and 1984 amendments to RCRA . . . in interpreting section 7003." *Valentine*, 856 F.Supp. at 633, n.5.

Restitution, § 115 (1937). Like a claim for restitution for the costs of abating a public nuisance under the common law, a claim for recovery of costs incurred in responding to an actual or threatened endangerment is without question equitable in nature. In such a case, the plaintiff does not seek compensatory damages; rather the plaintiff simply seeks to restore the status quo ante. *See Porter*, 328 U.S. at 402; *see, e.g., Hatco Corp. v. W.R. Grace & Co.*, 59 F.3d 400, 411-12 (3d Cir. 1995) (recovery of response costs under Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") are restitutionary); *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348, 1352 (4th Cir. 1987)(same); *United States v. Northeastern Pharmaceutical and Chemical Co.*, 810 F.2d 726, 749 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) (same). Accordingly, recovery of cleanup costs under Section 7002 is a claim in equity for restitution, and may be awarded by courts in appropriate circumstances.[10]

This Court has recognized the ability of courts to award restitution where the plaintiff has acted to abate a dangerous condition, even where the statute under which the action was brought does not explicitly state that restitution is available. *See Wyandotte*, 389 U.S. at 204 (approving restitution of government's expenses in removing a sunken vessel, even

[10]This Court has repeatedly held that the fact that an order calls for monetary relief in the form of restitution does not transform the claim into one for compensatory damages. *See Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558 (1990)(as distinguished from damages, orders awarding restitution in the form of monetary payments are generally granted to prevent unjust enrichment)".

though statute did not explicitly provide for restitution). Other courts have likewise ordered restitution of the costs of abating a public nuisance. *See, e.g., State v. Schenectady Chem., Inc.*, 103 A.D.2d 33, 479 N.Y.S.2d 1010 (N.Y.App. 1984) (state could receive restitution of costs for abating public nuisance caused by chemical wastes); *Brandon Township v. Jerome Builders, Inc.*, 80 Mich.App. 180, 263 N.W.2d 326 (1977) (town could recover costs of repairing dam as restitution for abating public nuisance).

Because Congress intended that Sections 7002 and 7003 were to constitute codifications of the common law of nuisance, and because restitution is an available remedy under such a cause of action, awarding restitution in appropriate circumstances is "proper and necessary" to enforce compliance with RCRA. *Porter*, 328 U.S. at 400. Furthermore, Congress has expressly provided that restitution is an appropriate means of making whole citizens who have voluntarily undertaken cleanups in a variety of other contexts, as shown above.

II. SECTION 7002 EMPOWERS COURTS TO AWARD RESTITUTION TO CITIZENS WHO, PRIOR TO FILING SUIT, INCUR EXPENSES IN ABATING A CONDITION WHICH MAY PRESENT AN IMMINENT AND SUBSTANTIAL ENDANGERMENT TO HEALTH OR THE ENVIRONMENT.

Petitioners and the United States incorrectly assert that restitution under Section 7002 is unavailable where the complained-of condition no longer presents an imminent and substantial endangerment to health or the environment at the commencement of suit under Section 7002. *See* Brief of

Petitioners ("Pet. Br.") at 13-18, Brief of Amicus Curiae, the United States of America ("U.S. Br.") at 11-21. Such a limitation is inconsistent with the prior decisions of this Court dealing with the award of restitution under statutes conferring equitable jurisdiction, as well as with the purposes of the RCRA Citizens' Suit Provision.

A. *Section 7002 Is Not Limited To Prospective Relief.*

Section 7002(a)(1)(B) covers situations where past or present conduct has created a condition "which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). Petitioners and amicus curiae, the United States, seize upon this language as evidence that the section is addressed only to prospective relief where the endangerment remains imminent and substantial at the moment suit is filed. Pet. Br. at 13-18; U.S. Br. at 11-21. In fact, the endangerment provision is not intended to provide a temporal limitation,[11] but to limit the application of Sections 7002 and 7003 to cases where there is great potential for harm if action is not taken. *See United States v. Reilly Tar & Chemical Corp.*, 546 F.Supp. 1100, 1109-10 (D.Minn. 1982);

---

[11]As the Fourth Circuit has stated:

> Such grammatical niceties as tense may be useful in arriving at a narrowly sculpted meaning, but they are of little help in interpreting remedial statutes in which actions such as "may be necessary" are contemplated in order to abate gross dangers to a community.

United States v. Waste Industries, 734 F.2d 159 (4th Cir. 1984).

see also United States v. Aceto Agr. Chemicals Corp., 872 F.2d 1373, 1383 (8th Cir. 1989) ("RCRA's 'imminent and substantial endangerment' language does not require EPA to file and prosecute its RCRA action *while* the endangerment exists") (emphasis in the original).[12]

Petitioners and the United States rely principally on this Court's decision in *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987), to support their argument that the court lacks the power to award restitution under Section 7002 where the plaintiff has removed the potential hazard to health or the environment prior to suit. *See* Pet. Br. at 13-22; U.S. Br. at 11, 14. That argument pays insufficient regard to the substantial differences between the Citizens Suit provision of the Clean Water Act addressed in *Gwaltney* and the imminent and substantial endangerment section of the RCRA Citizens Suit provision.

The citizens suit provision at issue in *Gwaltney* is typical of the citizens suit provisions in many other environmental statutes. These provisions only authorize suit against a defendant alleged to be "in violation" of the law. *See, e.g.*, Toxic Substances Control Act, 15 U.S.C. § 2619; Safe Drinking Water Act, 42 U.S.C. § 300j-8; CERCLA, 42 U.S.C. § 9659. Indeed, the citizen suit provision contained in Section 7002(a)(1)(A) of RCRA--not at issue in this case--is very

---

[12]While the Eighth Circuit stated in *Furrer* that the subject of the availability of restitution under Section 7003 was not decided in *Aceto*, it did not repudiate that portion of its opinion stating that the abatement of the condition prior to filing did not serve to divest the courts of jurisdiction over the matter. *See Furrer*, 62 F.3d at 1101.

similar to the provision construed in *Gwaltney*, as it addresses only ongoing violations of law. See 42 U.S.C. § 6972(a)(1)(A).

Moreover, typical citizens suit provisions do not contain broad language explicitly authorizing the courts to issue "other orders," or to order defendants to "take such other action as may be necessary" to achieve the aims of the act. *See, e.g.*, *Porter*, 328 U.S. at 399. Typical provisions, then, arguably limit the equitable jurisdiction of the courts, and empower them only to order injunctive relief or to assess penalties.

In contrast, Section 7002(a)(1)(B) of RCRA provides unique authority for citizens to sue in cases of actual or threatened endangerment. The section plainly addresses wholly past conduct, as it permits actions against "any person" including "any past" "generator," "transporter," or "owner or operator" of a "treatment, storage or disposal facility," who "has contributed to" the past "handling, storage, treatment, transportation, or disposal" of waste. 42 U.S.C. § 6972(a)(1)(B). This unique citizens suit provision also broadly authorizes the court to order "such other action as may be necessary" to redress the harm. 42 U.S.C. § 6972. The differences between Section 7002(a)(1)(B) and typical citizens suit provisions reflects the very different purposes of that Section, as it represents the codification of the common law of public nuisance, while typical citizens suit provisions create a purely statutory cause of action addressed only towards enforcing compliance with a specific statute. *See supra*, p. 19.

In light of the different objectives of Section 7002(a)(1)(B) and typical citizens suit provisions, the analysis in *Gwaltney* is inapplicable. The question is not whether an action properly lies under Section 7002 where the *conduct* of the defendant is

wholly in the past, as it was in *Gwaltney*; it plainly does. 42 U.S.C. § 6972. Rather, the question is whether an action lies under Section 7002 where the *effects* of that conduct have been abated by the plaintiff prior to the filing of suit, reducing or eliminating the need for an injunction. Such an action plainly lies. *See United States v. Moore*, 340 U.S. 616, 620 (1951).

In *Moore*, this Court was once again called upon to determine, as it had in *Porter*, the equitable jurisdiction of the district courts in enforcing the provisions of the Emergency Price Control Act, 50 U.S.C. App. § 925(a). The defendant argued that because the rent restrictions imposed by the Act had been lifted prior to the filing of suit, removing the authority (and the need) of the district courts to issue injunctions requiring landlords to charge the statutory rents, the courts likewise lacked jurisdiction to award restitution of overcharges. 340 U.S. at 618.

In rejecting this argument, this Court again focused on that portion of the Act which empowered the district courts to issue such "other orders" as are necessary to enforce compliance with the Act. *Id.* at 618-19. In holding that the district court properly awarded restitution despite the fact that there was no longer any jurisdiction to issue an injunction, the Court noted that if Congress had intended to limit the Act to purely prospective relief, "it would have been unnecessary to authorize orders for other than injunctive relief since the latter remedy is wholly adequate to secure prospective compliance." *Id.* at 620.

Similarly, had Congress intended to limit the district courts to purely prospective relief under Section 7002, it would not have provided the courts with the authority to order defendants "to take such other action as may be necessary." 42 U.S.C. § 6972. As shown above, this provision plainly empowers the

district courts to award restitution in appropriate circumstances. *Supra*, pp. 8-17; *see also* U.S. Br. at 22-29. Had Congress intended only to provide relief where the nuisance existed at the time of suit, it would not have provided the courts the power to order "other action" under Section 7002(a)(1)(B). *Moore*, 340 U.S. at 620.

B. *Denying Courts the Ability to Award Restitution Where a Citizen Has Acted To Abate the Potential Hazard Prior To Filing Suit Would Frustrate Congressional Intent.*

Further, if the argument of Petitioners and the United States were accepted, the result would contravene the purposes of Section 7002. Because Sections 7002 and 7003 are intended to secure the prompt abatement of conditions which may pose a public health or environmental hazard, and because Congress intended that these sections were to serve as the codification of the common law of public nuisance, denying relief to a plaintiff who has responded to and abated the nuisance would frustrate Congressional intent.

In 1984, Congress amended Section 7003 to clarify that the section "applies to any act, whether past or present, which has resulted in or may result in an imminent and substantial endangerment to health or the environment." *See* H.R. Rep. No. 198, 98th Cong., 2d Sess., pt. I, 53 (1983) *reprinted in* 1984 U.S.C.A.A.N. 5607. In doing so, Congress also explicitly approved the Third Circuit's holding in *Price*, by stating that "Section 7003 is 'intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risks posed by toxic wastes.'" *Id.*

(quoting *Price*, 688 F.2d at 213-14). Among the types of equitable relief recognized by the *Price* court was the power to award restitution. 688 F.2d at 214.

When Congress amended Section 7003 to clarify that it covered past conduct, it also enacted into law Section 7002(a)(1)(B). *See* H.R. Rep. No. 198, 98th Cong., 2d Sess., pt. I, 53 (1983) *reprinted in* 1984 U.S.C.A.A.N. 5612. Congress stated that "this expansion of the citizens suit provision will complement, rather than conflict with, the [EPA] Administrator's efforts to eliminate threats as to the public health and the environment, particularly where the Government is unable to take action because of inadequate resources." *Id.*

It is certainly true that a citizen's rights to relief under Section 7002 are limited, and that those limitations evince the intent of Congress to place primary responsibility for supervising the response to dangerous environmental conditions on state and federal government. Thus, Section 7002 requires ninety days notice to EPA, the State, and the defendant before suit can be filed, limits the right to bring the action where government is responding to the hazard, and provides that the action cannot be brought to challenge the siting of a facility. *See, e.g.*, 42 U.S.C. §§ 6972(b)(2)(A); 6972(b)(2)(B); 6972(b)(2)(C); 6972(b)(2)(D). However, these limitations do not extend so far as to limit the power of the courts to award restitution for the costs of a successful cleanup. Plainly, none of these provisions constitutes the type of "clear and valid legislative command" that is necessary to limit a court's equitable jurisdiction. *See Porter*, 328 U.S. at 399.

Petitioners and the United States argue that these limitations, and particularly the ninety day notice requirement, reflect Congressional intent to disallow recovery where a

plaintiff successfully abates the threatened or actual endangerment prior to filing the lawsuit. *See* Pet. Br. at 19-21; U.S. Br. at 21 & n.22. According to this view, the notice requirement serves to prohibit a prospective plaintiff from recovering costs expended to eliminate the hazard until 90 days have elapsed from the time notice is given and the lawsuit is filed. Such a result is at odds with the obvious Congressional intent of encouraging prompt abatement of imminent hazards. Indeed, Section 7002 does not require notice where the complaint alleges an endangerment respecting a violation of Subchapter III of RCRA, which contains the statute's hazardous waste provisions. *See* 42 U.S.C. § 6972(b)(2)(B). This exception reflects Congress' determination that in certain circumstances "the dangers of delay and the potential for greater damage to the public health or the environment outweigh the justification for the pre-suit delay periods." *Dague v. City of Burlington*, 935 F.2d 1343, 1351 (2d Cir. 1991).

In those cases that do not fall within this exception to the notice requirement, providing notice prior to filing a claim to recover costs expended to eliminate the endangerment nonetheless satisfies the purposes of giving notice. This Court has held that one purpose for the notice requirement in the typical citizens suit provision of environmental statutes is to give the prospective defendant an opportunity to take action (such as ceasing illegal discharges) which obviates the need for litigation. *See Gwaltney*, 484 U.S. at 60. However, this is not the sole purpose of giving notice, nor the dominant one. Notice also provides the government with the opportunity to bring an action, to intervene, or simply to monitor the litigation "to assure orderly and consistent development of caselaw in this

area." *See* H.R. Rep. No. 198, 98th Cong., 2d Sess., pt. I, 53 (1983) *reprinted in* 1984 U.S.C.A.A.N. 5612. Providing notice before filing suit for restitution also satisfies the policy aims of encouraging nonjudicial resolution of disputes and of apprising the government about the claim.[13]

Read as a whole, the types of limitations placed upon a citizen's right to bring an action pursuant to Section 7002(a)(1)(B) illustrate that Congress wanted the federal government or state government to have the opportunity to respond to conditions which may present an imminent and substantial endangerment to health or the environment. However, none of the express limitations set forth in Section 7002 state that a citizen must sit idly by and wait for either the EPA, the state, or the defendant to take action. *See* 42 U.S.C. §§ 6972(b)(2)(A); 6972(b)(2)(B); 6972(b)(2)(C). In fact, in enacting Section 7002(a)(1)(B), Congress expressly recognized the very real possibility that the government may be unable to take action due to "inadequate resources." *See* H.R. Rep. No. 198, 98th Cong., 1st Sess., pt. I, 53 (1983) *reprinted in* 1984 U.S.C.C.A.N. 5612.

The Petitioners' and the United States' curious interpretation of Section 7002(a)(1)(B) does not further the intent of Congress in enacting Section 7002(a)(1)(B), and would in fact impede

---

[13]Indeed, in many cases the potential RCRA citizens' suit plaintiff will not know the identity of the polluter for months or even years after the contamination is discovered. Under the views espoused by the Petitioners and the United States, a potential plaintiff should wait indefinitely to perform a cleanup or should hire detectives to find the source of the pollution so that notice can be given to the defendant before the cleanup is actually performed. *See* Pet. Br. at 19-21, U.S. Br. at 21 & n.22.

that purpose. If, as the United States argues, restitution could only be awarded if the condition which may present an imminent and substantial endangerment still existed at the moment suit was filed, it would discourage, or at least delay, voluntary cleanups of such conditions. Rather than securing the "prompt abatement of imminent and substantial endangerments," as Congress intended, citizens would be forced to wait at least ninety days (and much longer where the responsible party or parties are unknown) before taking action, or would have to take such incomplete action that the hazardous condition still existed at the time of filing. *Id.*[14] Indeed, under the view espoused by the Petitioners and the United States, a plaintiff who promptly and successfully undertakes to abate an imminent and substantial endangerment prior to filing suit would be denied compensation, whereas a plaintiff who delays responding to the hazard until after filing would be fully compensated. It strains reason to argue that this was the intent of Congress in passing Section 7002(a)(1)(B).

Allowing a citizen to take appropriate steps to abate the imminent and substantial endangerment and to later sue for restitution in no way frustrates Congressional intent, as would the Petitioners and the United States' interpretation of the

---

[14]At least one court has recognized a right of contribution under Section 7003, holding that permitting a right to contribution serves the dual purpose of promoting the prompt cleanup of the site while eliminating the inequity that would result if liable parties who did not participate in the cleanup were able to avoid contributing to the costs of the cleanup. *See Valentine*, 856 F.Supp. at 635. The same purposes would be served if a citizen who abates the potentially hazardous condition is awarded restitution of the costs expended in doing so.

provision. The citizen must comply with all of the jurisdictional prerequisites set forth in Section 7002 before bringing an action, prerequisites that are clearly directed towards encouraging government action to respond to the hazardous condition. *See* 42 U.S.C. §§ 6972(b)(2)(A); 6972(b)(2)(B); 6972(b)(2)(C). Moreover, courts would obviously have wide discretion in determining *whether* restitution should be awarded in a given circumstance, an entirely different inquiry than whether the court has the *power* to award restitution.

The United States suggests that plaintiffs who successfully abate conditions that produce or threaten to produce imminent and substantial endangerments to health or the environment will still have available to them state law remedies. U.S. Br. at 18-21. To the extent that this argument has any relevance to the inquiry before this Court, its fallacy is apparent upon examination.

First, several states do not possess environmental laws which cover all of the types of contamination which are covered under Section 7002(a)(1)(B). For example, it is beyond dispute that this provision applies to spilt or leaked petroleum products. *See KFC Western*, 49 F.3d at 523, n.6 (provision applies to gasoline); *Craig Lyle Ltd. Partnership v. Land O'Lakes, Inc.*, 877 F.Supp. 476, 483 (D. Minn. 1995) (spilt or leaked petroleum is a "solid waste" under RCRA); *Paper Recycling, Inc. v. Amoco Oil Co.*, 856 F.Supp. 671, 675 (N.D. Ga. 1993)(same); *Zands v. Nelson*, 779 F.Supp. 1254, 1262 (S.D. Cal. 1991)(same). As the Ninth Circuit recognized in *KFC Western*, California's environmental statutes do not provide relief to a private party who has expended funds in responding to a hazardous condition where the cause of the

condition is petroleum contamination. *KFC Western*, 49 F.3d at 523, n.6. In addition, the environmental laws of the States of Alabama, Louisiana, New Mexico, North Dakota, South Dakota, Vermont, Virginia and Wisconsin are not broad enough to provide compensation in most circumstances where a private citizen has responded to a release of petroleum which has created a hazardous condition.

Moreover, as the United States (one of the major polluters in this country) is undoubtedly aware, state law offers no recourse against the United States, and liability under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671 *et seq.*, depends upon proof of wrongful conduct. *See Laird v. Nelms*, 406 U.S. 797 (1972); *Dalehite v. United States*, 346 U.S. 15 (1953). It is due in part to the deficiencies of common law remedies that Congress intended Sections 7002 and 7003 to be "more liberal" than their "common law counterparts." S. Rep. No. 96-172, 96th Cong., 1st Sess., at 5 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5019, 5023 (1980) (explaining purpose of Section 7003).

The deficiencies of state law as a means of recovering the costs of abating an imminent and substantial endangerment where the federal government is the defendant are illustrated in a case pending against the United States Department of Agriculture in the United States District Court for the District of Massachusetts. *See* Complaint, *Commonwealth of Massachusetts v. United States Department of Agriculture*, C.A. No. 95-11668 REK (D. Mass., filed July 27, 1995).

In that case, the Commonwealth responded to an emergency situation in 1986 in which public drinking water supplies were found to be contaminated with various carcinogenic chemicals, including benzene. *Id.* The Commonwealth took certain steps

to abate the endangerment, including providing alternate drinking water supplies to its citizens and performing an evaluation of the extent of the environmental harm. *Id.*

Some years later the Commonwealth discovered that the United States Department of Agriculture ("USDA") was a probable cause of the contamination. *Id.*

Were a private defendant involved, Massachusetts could have proceeded under its own State "Superfund" law, Mass. Gen. Laws c. 21E. *See* Mass. Gen. Laws Ann. c. 21E, § 5 (1983 & 1995 Supp.)(creating liability for parties who release oil into the environment). However, because the contamination was caused by a release of petroleum, due to the sovereign immunity of the federal government, Chapter 21E could not be used to hold the USDA liable. *See* 42 U.S.C. § 9601(14) (excluding petroleum from regulation under CERCLA); *New York v. United States*, 620 F.Supp. 374, 386 (E.D.N.Y. 1985) (no cause of action lies against federal government under CERCLA where contamination is limited to uncontaminated petroleum products). The availability of a tort suit under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671 *et seq.* would entail the daunting task of proving a waiver of sovereign immunity in the face of the discretionary function exception, and would further require a showing of negligent or intentionally wrongful conduct on the part of the United States. *See supra*, p. 28. Due to the unavailability of other options, Massachusetts chose to proceed under Section 7002(a)(1)(B).

Contrary to the assertions of the United States, a ruling which limits the powers of the federal district courts to award restitution in such actions only where the endangerment continues to exist will lead to numerous situations where a plaintiff, in many cases an innocent party who has undertaken

a cleanup of a hazardous condition, will be left without a remedy. This will be particularly likely where the polluter is the federal government and the contamination consists of leaked or spilt petroleum.

Conclusion

For the foregoing reasons, the amici states urge this Court to affirm the decision of the Ninth Circuit Court of Appeals and to rule that Section 7002 enables citizens to recover the costs they have expended in responding to environmental hazards. Such a ruling is consistent with the established precedents of this Court and promotes the intent of Congress in enacting this legislation.

Respectfully submitted,

SCOTT HARSHBARGER
Attorney General
of Massachusetts

WILLIAM L. PARDEE*
JOHN BELING
KAREN MCGUIRE
Assistant Attorneys
General
200 Portland Street
Boston, MA 02114
(617) 727-2200
**Counsel of Record*

JEREMIAH W. NIXON
Attorney General
State of Missouri

JAMES LAYTON
JOSEPH P. BINDBEUTEL
DOUGLAS E. NELSON
Assistant Attorneys
General

December 8, 1995

BRUCE M. BOTELHO
Attorney General
State of Alaska

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

CALVIN E. HOLLOWAY
Attorney General
Territory of Guam

CARLA STOLLA
Attorney General
State of Kansas

CHRIS GORMAN
Attorney General
Commonwealth of
Kentucky

RICHARD P. IEYOUB
Attorney General
State of Louisiana

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

DEBORAH T. PORITZ
Attorney General
State of New Jersey

TOM UDALL
Attorney General
State of New Mexico

DENNIS C. VACCO
Attorney General
State of New York

DARRELL V. MCGRAW, JR.
Attorney General
State of West Virginia

JAMES E. DOYLE
Attorney General
State of Wisconsin

Supreme Court, U.S.
FILED
DEC 29 1995
CLERK

No. 95-83

In The

Supreme Court of the United States

October Term, 1995

ALAN MEGHRIG AND MARGARET MEGHRIG,

Petitioners,

vs.

KFC WESTERN, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO MOTION OF *AMICI CURIAE* MASSACHUSETTS, *ET AL.* FOR PERMISSION TO FILE A LATE BRIEF

JOHN P. ZAIMES
Counsel of Record

CLIFTON J. MCFARLAND
McCLINTOCK, WESTON,
BENSHOOF, ROCHEFORT,
RUBALCAVA & MACCUISH
444 South Flower Street,
43rd Floor
Los Angeles, California 90071
(213) 623-2322
Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

3 pp

Throughout these proceedings, Petitioners have tried to conduct themselves with the courtesy and dignity befitting a proceeding in the United States Supreme Court. For example, we have readily agreed to all requests for consent to file *amicus* briefs, even those opposing Petitioners' position and even those that have come to us within the last 48 hours before a filing deadline. We were contacted by both the Bi-State Development Agency of the Missouri-Illinois Metropolitan District and Kaufman & Broad Home Corporation and gave consent for each to appear as an *amicus* in support of Respondent. We have also readily supplied copies of our briefs and those of Respondent to opposing *amici* on request.

However, we were never contacted by several other *amici* who have appeared in this case, including the moving *amici*, to seek consent or to alert Petitioners to the fact that they would be appearing on behalf of Respondent. We understand that *amici* states are not required to seek consent prior to filing. However, given the shortened 20 day time period within which Petitioners have been required to prepare and file a reply brief, several days of which were taken up by the Christmas holiday, such notification would appear to have been an appropriate courtesy. That is particularly so because the moving *amici's* lengthy brief (30 pages) embarked on an entirely new analytical focus (although one not materially different from Respondent's new focus) in arguing that the Ninth Circuit Court of Appeal should be affirmed.

The moving *amici* served their surprise brief by first class mail, rather than overnight mail, on its due date, December 8th, and the brief did not arrive in Petitioners' counsel's offices until December 12. This further reduced the short amount of time available to Petitioners to prepare a response.[1]

The effect of all of this has been to put an increased burden on Petitioners to prepare a response to an entirely new

---

[1] That discourtesy has now been repeated by the moving parties. They filed their motion on or about December 19, again without any notice to Petitioners, and again served the motion by first class mail such that it was not received by Petitioners until December 26.

analytical construct in an extremely short time frame made shorter by the moving *amici's* acts. While it is certainly within the discretion of this Court to grant the moving *amici* permission to file out of time, given the circumstances and the insensitivities exhibited by the moving parties, this would appear to be an instance in which that motion should be denied.

Dated: December 28, 1995.

Respectfully submitted,

JOHN P. ZAIMES
Counsel of Record

CLIFTON J. MCFARLAND
MCCLINTOCK, WESTON, BENSHOOF,
ROCHEFORT, RUBALCAVA & MACCUISH

Counsel for Petitioners

Supreme Court, U.S.
FILED
DEC 29 1995
CLERK

No. 95-83

In The

Supreme Court of the United States

October Term, 1995

ALAN MEGHRIG AND MARGARET MEGHRIG,

Petitioners,

vs.

KFC WESTERN, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

OPPOSITION TO MOTION OF *AMICI CURIAE* MASSACHUSETTS, *ET AL.* FOR PERMISSION TO FILE A LATE BRIEF

JOHN P. ZAIMES
Counsel of Record

CLIFTON J. MCFARLAND
McCLINTOCK, WESTON,
BENSHOOF, ROCHEFORT,
RUBALCAVA & MACCUISH
444 South Flower Street,
43rd Floor
Los Angeles, California 90071
(213) 623-2322
Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

3 pp

Throughout these proceedings, Petitioners have tried to conduct themselves with the courtesy and dignity befitting a proceeding in the United States Supreme Court. For example, we have readily agreed to all requests for consent to file *amicus* briefs, even those opposing Petitioners' position and even those that have come to us within the last 48 hours before a filing deadline. We were contacted by both the Bi-State Development Agency of the Missouri-Illinois Metropolitan District and Kaufman & Broad Home Corporation and gave consent for each to appear as an *amicus* in support of Respondent. We have also readily supplied copies of our briefs and those of Respondent to opposing *amici* on request.

However, we were never contacted by several other *amici* who have appeared in this case, including the moving *amici*, to seek consent or to alert Petitioners to the fact that they would be appearing on behalf of Respondent. We understand that *amici* states are not required to seek consent prior to filing. However, given the shortened 20 day time period within which Petitioners have been required to prepare and file a reply brief, several days of which were taken up by the Christmas holiday, such notification would appear to have been an appropriate courtesy. That is particularly so because the moving *amici's* lengthy brief (30 pages) embarked on an entirely new analytical focus (although one not materially different from Respondent's new focus) in arguing that the Ninth Circuit Court of Appeal should be affirmed.

The moving *amici* served their surprise brief by first class mail, rather than overnight mail, on its due date, December 8th, and the brief did not arrive in Petitioners' counsel's offices until December 12. This further reduced the short amount of time available to Petitioners to prepare a response.[1]

The effect of all of this has been to put an increased burden on Petitioners to prepare a response to an entirely new

---

[1] That discourtesy has now been repeated by the moving parties. They filed their motion on or about December 19, again without any notice to Petitioners, and again served the motion by first class mail such that it was not received by Petitioners until December 26.

analytical construct in an extremely short time frame made shorter by the moving *amici's* acts. While it is certainly within the discretion of this Court to grant the moving *amici* permission to file out of time, given the circumstances and the insensitivities exhibited by the moving parties, this would appear to be an instance in which that motion should be denied.

Dated: December 28, 1995.

Respectfully submitted,

JOHN P. ZAIMES
Counsel of Record

CLIFTON J. MCFARLAND
MCCLINTOCK, WESTON, BENSHOOF,
ROCHEFORT, RUBALCAVA & MACCUISH

Counsel for Petitioners